IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-965

ABDALLAH W. TAMARI, LUDWIG W. TAMARI AND FARAH W. TAMARI, CO-PARTNERS DOING BUSINESS AS WAHBE TAMARI & SONS CO.,

Plaintiffs-Appellants,

vs.

BACHE & CO. (LEBANON) S. A. L., A LEBANESE CORPORATION, BACHE & CO. INCORPORATED, A DELAWARE CORPORATION, AND THE BOARD OF TRADE OF THE CITY OF CHICAGO, AN ILLINOIS CORPORATION,

Defendants-Appellees.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Defendants-Appellees.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioners, Abdallah W. Tamari, Ludwig W. Tamari and Farah W. Tamari, co-partners doing business as Wahbe Tamari & Sons Co. (hereinafter referred to as "Tamaris"), respectfully pray that a writ of certiorari be issued to review the decision in this case of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW.

The opinion of the United States Court of Appeals is reported as *Abdallah W. Tamari, et al.* v. *Bache & Co. (Lebanon) S. A. L., Bache & Co. Incorporated and the Board of Trade of The City of Chicago,* ..... F. 2d ..... (7th Cir. No. 76-1728, 10-19-77) and is set forth herein as Appendix A. The unpublished order entered by the United States District Court for the Northern District of Illinois on May 19, 1976, is set forth herein as Appendix B. The unpublished "preliminary opinion" of the district court, dated April 21, 1976, upon which its order is based is set forth herein as Appendix C.

JURISDICTION.

The court of appeals entered its judgment on October 19, 1977. Petitioners' timely petition to that court for a rehearing and for a rehearing *en banc* was denied on November 28, 1977. The unpublished order denying the petition for rehearing is set forth herein as Appendix D. On the petition of the petitioners the court of appeals has ordered that the issuance of mandate be stayed until January 4, 1978, pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure. The unpublished order granting the stay is set forth herein as Appendix E.

This Court has jurisdiction of this cause under 28 U. S. C. § 1254.

QUESTIONS PRESENTED.

1. Whether a complaint in federal court brought by a commodity futures investor under the Commodity Exchange Act, 7 U. S. C. §§ 1, *et seq.*, alleging fraud by a commodity futures merchant (broker) must be dismissed in favor of proceeding to arbitration, where the agreement to arbitrate results from a contract of adhesion drafted by the broker.

2. Whether the *sua sponte* dismissal of the complaint deprived petitioners of their statutory right and Due Process guarantee to a hearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Section 5a(11) of the Commodity Exchange Act, as amended by the Commodity Futures Trading Commission Act of 1974, provides in pertinent part:

> 7 U. S. C. § 7a(11)
>
> Each contract market shall—
>
> * * * * *
>
> (11) Provide a fair and equitable procedure through arbitration or otherwise for the settlement of customers' claims and grievances against any member or employee thereof; provided, that (i) the use of such procedure by a customer shall be voluntary, (ii) the procedure shall not be applicable to any claim in excess of $15,000, (iii) the procedure shall not result in any compulsory payment except as agreed upon between the parties, and (iv) the term 'customer' as used in this subsection shall not include a futures commission merchant or a floor broker. . . .

More importantly, the congressional mandate underpinning the enactment of the Commodity Exchange Act, 7 U. S. C. §§ 1, *et seq.*, is the protection of the individual commodity futures investor from a broker who has allegedly committed fraud. As summarized by Judge Swygert, dissenting, in the court of appeals decision in this case:

> It contravenes the spirit of the Act and undermines its remedial purposes to remand the investor who contends a broker has committed fraud to a committee composed of other brokers on the basis of an arbitration clause in an adhesion contract.

Appendix, p. 20.

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

Sections 3 and 4 of the Federal Arbitration Act, 9 U. S. C. §§ 3 and 4, provide in pertinent parts:

> Sec. 3. Stay of proceedings where issue therein referable to arbitration.—If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which the suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration, under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.
>
> Sec. 4. Failure to arbitrate under agreement—Petition to United States court having jurisdiction for order to compel arbitration—Notice and service thereof—Hearing and determination.—A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure [Rules, part 1]. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within

> the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure [Rules, part 1], or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

The pertinent provisions of Rule 12(b)(6) of the Federal Rules of Civil Procedure are as follows:

> "Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto . . ., except that the following defenses may . . . be made by motion: (6) failure to state a claim upon which relief can be granted. . . . If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

STATEMENT.

This is an action in which Petitioners, Tamaris, seek to reverse and set aside the *sua sponte* dismissal of their complaint praying for a declaratory judgment that arbitration proceedings between Tamaris and Bache & Co., Incorporated, a Delaware corporation (hereinafter "Bache Delaware") before a panel of the arbitration committee of the Board of Trade of the City of Chicago (hereinafter "CBOT") are null and void as violative of the Commodity Exchange Act (hereinafter "the Act"), 7 U. S. C. §§ 1, *et seq.* This action also seeks to reverse and set aside the affirmance by the court of appeals of the district court's order that Tamaris be compelled to arbitrate the underlying dispute pursuant to the provisions of the Federal Arbitration Act, 9 U. S. C. § 4. The facts relating to these issues are not substantially in dispute.

In May and again in September, 1972, Tamaris executed Bache Delaware customer's agreement forms for the establishment of two commodity futures trading accounts. Exhibit A.* Paragraph 14 of the Bache Delaware customer's agreement forms requires arbitration of broker-customer disputes. Exhibit B. Thereafter, commodity futures trading in the subject accounts followed.

On January 9, 1974, Bache Delaware served "notarial notice" upon Tamaris demanding arbitration of a dispute concerning an alleged $376,366.96 indebtedness allegedly arising out of commodity futures trading. Exhibit C. The "notarial notice" also required that Tamaris select the arbitration forum within five days; otherwise Bache Delaware would select the forum. These demands were made pursuant to paragraph 14 of the Bache Delaware customer's agreement forms.

Tamaris replied to the "notarial notice" and in explicit reliance on paragraph 14 of the customer's agreement forms re-

* Citations to "Exhibits" refer to the exhibits tendered below by Petitioners to the district court in support of the relief prayed for in their complaint. The exhibits referred to herein are set forth as Appendix F to this petition.

quested that the CBOT be the arbitration forum. Exhibit D. The reply also requested that the arbitration proceedings include Tamaris' counterclaim for $2,150,000.00 which they had paid to Bache Delaware and Bache & Co. (Lebanon) S. A. L., a Lebanese corporation (hereinafter "Bache Lebanon"). As a result of this exchange, the parties executed the submission agreement for arbitration before the arbitration committee of the CBOT on about April 27, 1974. Exhibit E.

Matters of scheduling, discovery and procedure were discussed among counsel for Tamaris, Bache Delaware and the CBOT, and various letters and requests circulated between the parties until October 16, 1975, when the CBOT arbitration committee met for the first time to consider this matter. Exhibit F.

Among the matters discussed at the CBOT arbitration committee meeting on October 16, 1975, was the Staff Opinion of the Commodity Futures Trading Commission (hereinafter "CFTC"), concerning whether Section 5a(11) of the Act, 7 U. S. C. § 7a(11), operated to bar arbitration of the underlying dispute. Exhibit G. The arbitration committee rejected the applicability of the Staff Opinion and stated that it would only proceed if the parties would waive all objections to the committee's jurisdiction to proceed in the matter.* Exhibit F.

* While not of central importance to this Statement, the Commodity Futures Trading Commission Act of 1974 became effective on April 21, 1975. It amended the Act, 7 U. S. C. §§ 1, *et seq.*, and provides, *inter alia*:

> Sec. 5a Each contract market [the CBOT] shall—
>
> (11) Provide a fair and equitable procedure through arbitration or otherwise for the settlement of customers' claims and grievances against any member or employee therefor; provided, that (i) the use of such procedure by a customer shall be voluntary, (ii) the procedure shall not be applicable to any claim in excess of $15,000, (iii) the procedure shall not result in any compulsory payment except as agreed upon between the parties, and (iv) the term 'customer' as used in this subsection shall not include a future commission merchant or a floor broker;

The amending Act also contains a savings clause, Section 412, 7 U. S. C. § 4a, note, which provides as follows:

(Footnote continued on next page.)

The decision of the arbitration committee to entertain the arbitration only if the parties would waive all objections to the committee's jurisdiction was confirmed by letter dated October 27, 1975, which was accompanied by the CBOT's waiver form. Exhibits H and I, respectively. This letter states in pertinent part:

> Enclosed is a form which the Arbitration Committee requires your client to sign before it will begin hearings on this matter.

Tamaris refused to execute the required waiver. On December 9, 1975, Tamaris informed the CBOT arbitration committee of their decision to refuse to sign the waiver, to terminate proceedings and to seek relief in court. Exhibit J.

On December 10, 1975, Tamaris filed a related district court case seeking relief under the Act, 7 U. S. C. §§ 1, *et seq.*, for claims arising out of the opening and management of Tamaris commodity futures trading accounts. Exhibit K.* In short, the complaint raises claims substantially similar to those raised by Tamaris in their counterclaim filed in the arbitration case. Notwithstanding Tamaris' refusal to execute the required waiver

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(Footnote continued from preceding page.)

> Pending proceedings under existing law shall not be abated by reason of any provision of this Act but shall be disposed of pursuant to the applicable provisions of the Commodity Exchange Act, as amended, in effect prior to the effective date of this Act.

Due to these amendments to the Act, the CBOT questioned, in early 1975, whether the arbitration committee had jurisdiction to entertain the arbitration between Tamaris and Bache Delaware. Exhibit F. In July, 1975, the staff of the Commodity Futures Trading Commission issued the above referenced Staff Opinion to the effect that arbitration proceedings pending before the effective date (April 21, 1975) of the amendment to the Act were not to be abated.

It must be noted, however, that prior to April 21, 1975 the Commodity Exchange Act, 7 U. S. C. § 1, *et seq.*, was silent on the subject of arbitration of disputes between members of commodity exchanges and their customers.

*The companion action, Abdallah W. Tamari, et al., v. Bache & Co. (Lebanon) S. A. L., et al., No. 75 C 4189, is still pending in the district court against the defendant Bache Lebanon.

and the filing of suit the CBOT arbitration committee met on December 11, 1975, and began to take testimony over the objection of the Tamaris' counsel. This meeting had been tentatively set by the committee on October 30, 1975, provided the parties had executed the above described waivers. Exhibit F.

Due to the persistence of the CBOT arbitration committee to schedule and conduct hearings in this matter, the instant complaint was filed on January 6, 1976. Exhibit L. The complaint prays for declaratory and injunctive relief under the Act, 7 U. S. C. §§ 1, *et seq.*, as well as 28 U. S. C. § 2201 (declaratory judgment). Jurisdiction of the district court is invoked pursuant to 28 U. S. C. §§ 1331(a), 1337 and 1350.

The complaint in one count seeks relief on various grounds which may be categorized as follows: (1) Tamaris' agreement to participate in arbitration was induced by fraud and coercion which rendered the arbitration agreement invalid; (2) Section 5a(11) of the Commodity Exchange Act, 7 U. S. C. § 7a(11), applied and operated to bar arbitration; and (3) several infirmities arising out of the arbitration proceedings themselves.

Tamaris were unable to obtain services of summons and complaint on Bache Lebanon. The CBOT filed its answer generally denying any wrongdoing. Exhibit M. Bache Delaware filed a motion to consolidate this cause with *Abdallah W. Tamari, et al.* v. *Bache & Co. (Lebanon) S. A. L., et al.*, No. 75 C 4189, pending in the same court, and also moved pursuant to the Federal Arbitration Act, 9 U. S. C. §§ 3 and 4 to stay the instant cause until completion of the arbitration proceedings then pending before the CBOT and for an order compelling Tamaris to proceed to complete the arbitration proceedings. Exhibit N. Earlier, Tamaris had filed a motion to stay arbitration pending the decision of the district court. Exhibit O. The court took the described motions and supporting memoranda under advisement pursuant to Rule 13 of the Rules of the United States District Court for the Northern District of Illinois. The court denied the Tamaris' interim motion to stay arbitration pending decision on the motions taken under advisement.

By "preliminary opinion" dated April 21, 1976, the district court found insofar as this case is concerned: that the Tamaris and Bache Delaware entered into a valid arbitration agreement covering the underlying dispute; that the Federal Arbitration Act applied and that under Sections 3 and 4 of that Act, 9 U. S. C. §§ 3 and 4, the district court case must be stayed and Tamaris ordered to arbitrate; that Section 5a(11) of the Commodity Exchange Act, 7 U. S. C. § 7a(11), did not apply to the instant case, since the savings provision of the same Act, 7 U. S. C. § 4a, note, precluded its application; and, that Tamaris' other claims were premature and could only be raised after completion of the arbitration pursuant to Section 10 of the Federal Arbitration Act, 9. U S. C. § 10. In addition, the "preliminary opinion" indicated that the instant case should be dismissed as to Bache Delaware and the CBOT and consolidated with case No. 75 C 4189 as to Bache Lebanon which was the sole remaining defendant in that case. However, the court's subsequent order dismissed the complaint in its entirety for failure to state a claim upon which relief could be granted.

The court of appeals affirmed the district court, with a dissenting opinion filed by Judge Swygert. It is to this decision of the United States Court of Appeals for the Seventh Circuit that this petition for a writ of *certiorari* is directed.

REASONS FOR GRANTING THE WRIT.

I. The Decision of the United States Court of Appeals for the Seventh Circuit, That Dismissal of an Investor's Complaint Under the Commodity Exchange Act Alleging Fraud by a Broker Is Proper Where the Agreement to Arbitrate Results from a Contract of Adhesion, Is Inconsistent with the Judgments of This Court and of the Same and Other United States Courts of Appeals.

The question raised here affecting the Commodity Exchange Act, 7 U. S. C. §§ 1, *et seq.* and the Federal Arbitration Act,

9 U. S. C. §§ 3 and 4, is one that has never been submitted to this Court for its resolution. In this sense, it is novel. But this Court has heretofore decided cases that have made clear the proper resolution of the issue, a resolution in conflict with the decision by the United States Court of Appeals for the Seventh Circuit in this action.

The complaint herein alleges that Bache Delaware committed specified fraudulent acts in the opening and handling of Tamaris accounts in violation of the Act, 7 U. S. C. §§ 1, *et seq.* The Act has a primary purpose the protection of investors from sophisticated and manipulative brokers, as disclosed by the legislative history accompanying the most recent amendments:

> The present Commodity Exchange Act is predicated upon findings and conclusions of the Congress that (1) transactions in commodity futures are carried on in large volume by the public, as well as by persons engaged in the business of buying and selling agricultural commodities in interstate commerce, and (2) such transactions and prices are susceptible to speculation, manipulation fluctuations, and such fluctuations are a burden upon interstate commerce and make regulation essential in the public interest. A fundamental purpose of the Commodity Exchange Act is to insure fair practice and honest dealing on the commodity exchanges and to provide a measure of control over those forms of speculative activity which too often demoralize the markets to the injury of producers and consumers and the exchanges themselves. S. Rep. No. 93-1131, 93d Cong., 2d Sess., 1974 U.S. Code Cong. & Ad. News 346 U.S., at 435.

Judge Swygert, dissenting, concisely states the petitioners' assertion in this regard and concurrently summarized Petitioners' reliance on this Court's teachings in *Wilko* v. *Swan*, 346 U. S. 427 (1953):

> Given the congressional mandate to protect the individual commodities investor, the courts should not permit the dismissal of complaints alleging fraud by a commodities broker on the basis of an adhesion contract drafted by

that broker. We can be confident that, if the commodities brokers as a class can compel the arbitration of anti-fraud claims rather than litigating them in court, they will do so. The arbitrators before whom the complaints would be filed would also be insiders in the commodities industry, and would tend to be more tolerant of questionable practices by brokers than would a judge who is an outsider to the field. But the individual investor is entitled to have his claim decided by an outsider. It contravenes the spirit of the Act and undermines its remedial purposes to remand the investor who contends a broker has committed fraud to a committee composed of other brokers on the basis of an arbitration clause in an adhesion contract.

It was precisely this problem which motivated the Supreme Court's decision in Wilko v. Swan, 346 U.S. 427 (1953). The majority distinguishes Wilko because there is no analogue in the Commodity Exchange Act to section 14 of the Securities Act of 1933. But it is clear from the opinion in Wilko that a major underpinning of the Court's holding was also the vulnerability of an individual investor to being manipulated by insiders in the securities industry. 346 U.S., at 435.

Appendix A, pp. 20-21.

Judge Swygert's assessment of this Court's decision in *Wilko* is fully supported by the concluding paragraph of the opinion of the Court:

> Two policies, not easily reconcilable, are involved in this case. Congress has afforded participants in transactions subject to its legislative power an opportunity generally to secure prompt, economical and adequtae solution of controversies through arbitration if the parties are willing to accept less certainty of legally correct adjustment. On the other hand, it has enacted the Securities Act to protect the rights of investors and has forbidden a waiver of any of those rights. Recognizing the advantages that prior agreements for arbitration may provide for the solution of commercial controversies, we decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under this Act.

346 U.S., at 438.

A rapidly increasing number of recent cases concur with Judge Swygert's view that there need not be any analogue to Section 14 of the Securities Act of 1933, is 15 U. S. C. § 77n.* Foremost among these decisions is the decision of the Seventh Circuit in *Weissbuch* v. *Merrill, Lynch, Pierce, Fenner & Smith Inc.*, 558 F. 2d 831 (7th Cir. 1977).

In *Weissbuch* the issue was whether plaintiff's claim under the Securities Exchange Act of 1934 was barred by an agreement to arbitrate all futures disputes contained in the customer's account agreement. The court held the arbitration clause unenforceable because it was not the product of actual bargaining between the parties and enforcement would undermine the policy of protecting the investor as intended by the Securities Exchange Act of 1934. 558 F. 2d, at 835.

The Third Circuit was confronted with the same question and reached the same conclusion in *Ayers* v. *Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 538 F. 2d 532. (3d Cir.), *cert. denied*, 429 U. S. 1010 (1976):

> In Wilko v. Swan, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1963), the Supreme Court held that the anti-waiver provision of the Securities Act of 1933, 15 U.S.C. §§ 77n, which is almost identical to § 29(a) of the 1934 Act, 15 U.S.C. § 78cc(a), rendered "void" a prospective agreement between a brokerage firm and a customer which would have required arbitration. It is enough to say that the Supreme Court found prospective waivers of the right to judicial trial and review to be inconsistent with the Congress' overriding concern for the protection of investors. Wilko v. Swan, supra, 346 U.S. at 437, 74 S.Ct. 182; see Scherk v. Alberto-Culver Co., 417 U.S. 506, 512, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974).

538 F.2d, at 536-537.

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*15 U. S. C. § 77n provides: Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the commission shall be void.

Similar extensions of the *Wilko* decision may be found in the antitrust area, in which no analogue to Section 14 of the Securities Act exists. *Power Replacements, Inc.* v. *Air Preheater Co.*, 426 F. 2d 980 (9th Cir. 1970). Lower courts, too, have refused to enforce arbitration agreements, *e.g.*, *Macchiavelli* v. *Shearson, Hammill & Co.*, 384 F. Supp. 21, 27-28 (E. D. Cal. 1974) (securities); *Milani* v. *ContiCommodity Services, Inc.*, [1976] Commodity Futures L. Rep. (CCH) ¶ 20, 227 (N. D. Cal. 1976) (commodity futures).

In addition, as early as 1975 the Commodity Futures Trading Commission recognized the unfairness of the process herein involved, and stated:

> As already noted, one factor leading to passage of the CFTC Act was allegations made in court cases and newspaper articles that the arbitration procedures of contract markets had been unfairly applied. The Commission believes that the procedural protections contained in the amended proposed rules will prevent the possibility of abuses such as those alleged in the congressional hearings. The voluntary nature of procedures established by contract markets is a central part of this protection. *A contract of adhesion, or an uninformed waiver of rights, is not a voluntary agreement, as customers may not be fully cognizant of the effects of an agreement to arbitrate until the claim or grievance arises.* The amended proposed rule, therefore, provides that the parties' agreement to submit the claim or grievance to the procedure must have been made after the claim or grievance arose. [1976] Commodity Futures L. Rep. (CCH) ¶ 20, 111, at 20,805 (Emphasis added).

The decision of this Court in *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 394 (1967) and *Scherk* v. *Alberto-Culver Co.*, 417 U. S. 506 (1974) are not dispositive here. At worst they are inapposite. Neither case holds that contracts of adhesions, or other contracts evincing overreaching or coercion, are enforceable under the Federal Arbitration Act. On the contrary, this Court's opinion in *Prima Paint* explicitly notes: "Indeed, no claim is made that Prima Paint . . . was not entirely free to so contract." 388 U. S., at 406. And in *Scherk*, this Court underscored the necessity that arbitration clauses in contracts be "freely negotiated" to be enforceable under the Federal Arbitration and, further, "that an arbitration or forum-selection clause in a contract is not enforceable if the inclusion of that clause in the contract was the product of fraud or coercion." 417 U. S., at 519, note 14.

The decision of the United States Court of Appeals for the Seventh Circuit is in conflict with the above referenced decisions of this Court as well as the decisions of the same and other courts of appeals, and should be reversed.

II. The Judgment Below, That a District Court May Compel a Party to Arbitrate Without First Conducting a Hearing or Without First Establishing the Existence of a Valid Arbitration Agreement, Deprived Petitioners of Their Due Process and Statutory Rights and So Far Departed from Accepted Court Proceedings As to Call for the Exercise of This Court's Power of Supervision.

The district court dismissed Tamaris' complaint for failure ot state a claim upon which relief could be grated yet simultaneously ordered Tamaris to proceed with the arbitration. Appendix B, C, and F, Exhibit P. The latter order was predicated on an express finding by the district court that the agreement to arbitrate was voluntarily entered into by Tamaris and, accordingly, they were required to arbitrate pursuant to Section 4 of the Federal Arbitration Act, 9 U. S. C. § 4. However, the court of appeals found that there could be no finding that a valid arbitration agreement existed. In fact, the court of appeals found that the district court's "finding of a valid arbitration agreement was in error . . ." Appendix A, p. 12. Notwithstanding this adjudication the court of appeals *sub silentio* required Tamaris to arbitrate contrary to the mandate of Section 4 of the Federal Arbitration Act, 9 U. S. C. § 4, that arbitration

may not be judicially compelled until the court is "satisfied that the making of the agreement for arbitration . . . is not in issue."* Moreover, Section 4 also expressly prescribes that the parties shall be heard "if the making of the arbitration agreement . . . be in issue. . . ."** See also, *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395 at 403 (1967). According to the analysis set forth in the court of appeals majority opinion, neither of the above quoted statutory provisions was met, *i.e.*, there was no hearing regarding the making of the agreement and it cannot be said that the agreement to arbitrate is valid.

Therefore, the court of appeals erred in sanctioning judicially compelled arbitration pursuant to Section 4 of the Federal Arbitration Act, 9 U. S. C. § 4, in contravention of express statutory requirements and, more importantly, the guarantee of the Fifth Amendment to the United States Constitution that: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

By the same token, the judgment of the court of appeals is in error in another closely related finding. As noted above, Tamaris' complaint was dismissed for failure to state a claim for which relief could be granted. However, the record on appeal fully disclosed the district court had before it affidavits in support of Tamaris' motion to stay arbitration, the petition and supporting exhibits of Bache Delaware to stay court proceedings and compel arbitration and the answer of the CBOT. Notwithstanding the presentment of these matters outside the complaint and their inclusion in the record on appeal the court of appeals concluded that the district court's dismissal order

*Section 4, 9 U. S. C. § 4, reads in part: "The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement."

**Section 4, 9 U. S. C. § 4, further provides: "If the making of the arbitration agreement or the failure, neglect or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof."

was properly entered pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.*

The court of appeals erred in finding that the district court's order dismissing the complaint for failure to state a claim for which relief could be granted was proper.** The record on appeal before the court of appeals establishes that matters outside the complaint were presented to and not excluded by the district court. Thus, under the provisions of Rule 12, it was required that the motion be treated and disposed of as a motion for summary judgment.

Even assuming, *arguendo*, the correctness of the finding of the court of appeals that the dismissal was proper under Rule 12(b)(6) of the Federal Rules of Civil Procedure the court erred by failing to apply the correct test for determining the sufficiency of complaints dismissed under Rule 12(b)(6). That test is concisely set forth by this court in *Scheuer* v. *Rhodes*, 416 U. S. 232, 236 (1974):

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admission, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the

*The pertinent provisions of Rule 12(b)(6) of the Federal Rules of Civil Procedure are as follows:

> Every defense, in law or fact, to a claim for relief in any pleadin . . . shall be asserted in the responsive pleading thereto . . ., except that the following defense may . . . be made by motion: (6) failure to state a claim upon which relief can be granted . . . . If, on motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

** The record on appeal before the court of appeals established that matters outside the complaint were presented to and not excluded by the district court. Thus, under the provisions of Rule 12, it was required that the motion be treated and disposed of as a motion for summary judgment.

> claims. Indeed, it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.

This Court then went on to quote from *Conley* v. *Gibson*, 355 U. S. 41, 45-46 (1953):

> In appraising the efficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

Such a test is simply not applied or even referred to by the United States Court of Appeals for the Seventh Circuit in this action.

Under this Court's decisions, the United States Court of Appeals for the Seventh Circuit has so far sanctioned a departure by the district court of the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION.

Petitioners' rights under the Commodity Exchange Act, 7 U. S. C. §§ 1, *et seq.*, are violated when they are compelled to arbitrate post agreement disputes where the agreement to arbitrate arises from an arbitration clause in an adhesion contract. It contravenes the spirit of the Act and undermines its remedial purposes to preclude an investor from seeking the judicial relief to which he would otherwise be entitled but for the presence of a customer's clause agreement requiring arbitration. The decisions of this Court and the decisions of various courts of appeal support petitioners' contentions.

Further, the *sua sponte* dismissal of the petitioners' complaint and the affirmance of that dismissal by the United States Court

of Appeals for the Seventh Circuit for the reasons stated deprive petitioners of statutory rights and Due Process guarantees and otherwise call for the exercise by this Court of its powers of supervision.

For these reasons, petitioners pray that this Honorable Court issue a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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In the

United States Court of Appeals

For the Seventh Circuit

No. 76-1728

ABDALLAH W. TAMARI, LUDWIG W. TAMARI and FARAH W. TAMARI, Co-partners doing business as WAHBE TAMARI & SONS CO.,

Plaintiffs-Appellants,

v.

BACHE & CO. (LEBANON) S.A.L., a Lebanese corporation, BACHE & CO. INCORPORATED, a Delaware corporation, and the BOARD OF TRADE OF THE CITY OF CHICAGO, an Illinois corporation,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76 C 21—**John F. Grady**, *District Judge.*

ARGUED FEBRUARY 25, 1977—DECIDED OCTOBER 19, 1977

Before SWYGERT and WOOD, *Circuit Judges*, and CHRISTENSEN, *Senior District Judge.**

WOOD, *Circuit Judge.* This is the second in a series of four cases growing out of the same transactions brought by plaintiffs, a Lebanese partnership and its partners

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* The Honorable A. Sherman Christensen, Senior District Judge of the United States District Court for the District of Utah, is sitting by designation.

(hereinafter "Tamari"), principally against Bache & Co., Incorporated, a Delaware corporation, now Bache Halsey Stuart, Inc. (hereinafter "Bache"), in an effort to obtain declaratory relief for alleged fraud in violation of the Commodity Exchange Act, 7 U.S.C. § 1, *et seq.*[1] Service was not secured upon Bache & Co. (Lebanon) S.A.L., a Lebanese corporation.

The present or second case is an appeal from the order of the district court entered on May 19, 1976, dismissing plaintiff's one count complaint on the ground that the complaint failed to state a claim upon which relief could be granted. The complaint seeking declaratory and injunctive relief under the Commodity Exchange Act, as amended, 7 U.S.C. § 1, *et seq.*, and 28 U.S.C. § 2201, prayed for the termination of the arbitration proceeding then in progress between Tamari and Bache being

[1] It may be helpful to identify the other cases. The first case was filed by Tamari on December 10, 1975, in the District Court for the Northern District of Illinois, seeking damages for fraud under the Commodity Exchange Act. The present or second suit in the same court followed on January 6, 1976, seeking to halt the arbitration proceedings. On May 19, 1976, the district court ruled in favor of defendants in both cases, holding that there was an enforceable agreement to arbitrate under the Federal Arbitration Act, 9 U.S.C. §§ 3-4, and that Tamari was to proceed to arbitrate accordingly. Appeals followed. This court on September 23, 1976, dismissed the appeal in the first case, without prejudice to any further appeal from an appealable order. *Tamari v. Bache & Co. (Lebanon) S.A.L.*, No. 76-1729 (7th Cir. Sept. 23, 1976). Prior to that decision, Tamari on June 6, 1976, filed its third action which was against the eight arbitrators named by the Chicago Board of Trade, who were then in the process of hearing the dispute between Tamari and Bache. Bache was permitted to intervene in that suit. The district court on November 15, 1976, dismissed that action, holding that Tamari had to proceed with the pending arbitration and exhaust all avenues of administration appeal before returning to the district court. This court affirmed. *Tamari v. Conrad*, No. 77-1003 (7th Cir., April 12, 1977). On January 27, 1977, at the conclusion of the arbitration the fourth suit was filed by Tamari against Bache, seeking to have the district court set aside the award of the panel of arbitrators adverse to Tamari, which was entered on June 21, 1976, and affirmed by the Appeals Committee of the CBOT on January 25, 1977. That case is still pending in the district court.

conducted by the Chicago Board of Trade (hereinafter CBOT). The complaint alleged in general the existence of a dispute between Tamari and Bache, Tamari's establishment of commodity futures trading accounts with Bache, trading in those accounts and monies paid and allegedly owing to Tamari as a result of the trading. The grounds alleged for the relief sought were summarized by Tamari as follows: Tamari's agreement to participate in arbitration was induced by fraud and coercion which rendered the arbitration agreement invalid: Section 5a(11) of the Commodity Exchange Act, 7 U.S.C. § 7a(11), which became effective on April 21, 1975, applied and operated to bar arbitration; and there were infirmities which arose out of the arbitration proceedings themselves. We do not, however, read Tamari's complaint as alleging that the "agreement" to arbitrate contained in the original total agreement was specifically induced by fraud and coercion as distinguished from the contract generally. What is alleged in addition to fraud relating to the total agreement generally is that the "submission" of the dispute to arbitration was caused by fraud; that Tamari did not "voluntarily submit" to the jurisdiction of the CBOT; and that "participation" in the arbitration was coerced. These conclusionary and general allegations read together appear to us to refer primarily to events occurring after the original agreements containing the arbitration clauses were entered into.

Preceding the district court's order of dismissal the court entered on April 21, 1976, what was captioned a "Preliminary Opinion." In that opinion the court concluded that Tamari and Bache had entered into a valid arbitration agreement covering the underlying dispute; that the Federal Arbitration Act applied and that under Sections 3 and 4 of that Act, 9 U.S.C. §§ 3-4,[2] the

[2] The Federal Arbitration Act provides in pertinent parts as follows:

> Sec. 3. Stay of proceedings where issue therein referable to arbitration.—If any suit or proceeding be brought in any of the courts of the United States upon any issue

(Footnote continued on following page)

case should be stayed as to Bache (Lebanon), dismissed as to Bache and CBOT, and Tamari ordered to arbitrate; that Section 5a(11) of the Commodity Ex-

[2] *continued*

referable to arbitration under an agreement in writing for such arbitration, the court in which the suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Sec. 4. Failure to arbitrate under agreement—Petition to United States court having jurisdiction for order to compel arbitration—Notice and service thereof—Hearing and determination.—A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure [Rules, part 1]. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the

(Footnote continued on following page)

change Act, 7 U.S.C. § 7a(11), did not apply to the case, since the savings provision of that Act, 7 U.S.C. § 4a, note,[3] precluded its application; and that Tamari's other claims were premature and could only be raised after completion of arbitration pursuant to Section 10 of the

[2] *continued*

return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure [Rules, part 1], or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

[3] The Commodity Exchange Act as amended by the Commodity Futures Trading Commission Act of 1974, provides in pertinent parts:

7 U.S.C. § 7a(11)

Each contract market shall—

* * *

(11) Provide a fair and equitable procedure through arbitration or otherwise for the settlement of customers' claims and grievances against any member or employee thereof; provided, that (i) the use of such procedure by a customer shall be voluntary, (ii) the procedure shall not be applicable to any claim in excess of $15,000, (iii) the procedure shall not result in any compulsory payment except as agreed upon between the parties, and (iv) the term 'customer' as used in this subsection shall not include a futures commission merchant or a floor broker. . . .

7 U.S.C. § 4a, note

Pending proceedings under existing law shall not be abated by reason of any provision of this Act but shall be disposed of pursuant to the applicable provisions of the Commodity Exchange Act, as amended, in effect prior to the effective date of this Act.

Federal Arbitration Act, 9 U.S.C. § 10.[4] That preliminary opinion was entered jointly in both the first case and in this case. Against that background the district court's subsequent *sua sponte* dismissal of the complaint in this case upon the ground that it failed to state a claim upon which relief could be granted must be interpreted. Plaintiff argues that the factual assumptions made by the court in the preliminary opinion, principally that there was a valid agreement to arbitrate, denote the dismissal a grant of summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Plaintiff's position is that certain material factual assumptions made by the court have no proper foundation in the record and are in dispute. Therefore, plaintiff argues the court's subsequent order was the improper entry of summary judgment. Were we to view the order as granting summary judgment we would agree with plaintiffs, but we perceive the order instead to be a dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure which provides for dismissal upon motion for failure to state a claim upon which

[4] 9 U.S.C. § 10 further provides in pertinent part:

Vacation—Grounds—Rehearing.—
In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

relief can be granted, the exact language used by the court in its dismissal order. The defendants had filed no motions seeking relief in either form. The court was not however precluded, although it generally may be considered hazardous, from entering the order of dismissal on its own motion provided that sufficient basis for the court's action was otherwise apparent from the plaintiff's pleadings. For the purpose of testing the trial court's action, well pleaded allegations of the complaint are to be taken as admitted, but mere unsupported conclusions of fact or mixed fact and law are not admitted. *Hess v. Petrillo*, 259 F.2d 735 (7th Cir. 1958), *cert. denied*, 359 U.S. 954; *Homan Manufacturing Co. v. Russo*, 233 F.2d 547 (7th Cir. 1956). Since the relief sought was declaratory, that becomes another critical ingredient to be considered in judging the propriety of the dismissal. It has long been established that the grant of declaratory relief is discretionary. The appellate court may substitute its own judgment for that of the trial court if the trial court's exercise of that discretion is considered erroneous. *Brillhart v. Excess Ins. Co.*, 316 U.S. 491 (1942); *Sears, Roebuck & Co. v. American Mutual Liability Ins. Co.*, 372 F.2d 435 (7th Cir. 1967); *Cunningham Brothers Inc. v. Bail*, 407 F.2d 1165 (7th Cir. 1969), *cert. denied*, 359 U.S. 959.

The specific issues argued by Tamari are these:

1) What is the effect, if any, of Sec. 5a(11) of the Commodity Exchange Act, 7 U.S.C. § 7a(11) as amended, as applied to the arbitration proceedings in this case.

2) Was the CBOT estopped from arbitrating the underlying dispute.

3) Is there a factual basis for the district court's finding of a valid agreement to arbitrate.

4) Was there a procedural due process violation in the district court's dismissal.

5) Did the district court err in not finding a conflict of interest within CBOT affecting the arbitration proceeding.

6) Does Section 10 of the Federal Arbitration Act preclude the district court's consideration of allegations of misconduct by the arbitrators during the arbitration proceedings.

I.

The preliminary opinion of the district court directed that the arbitration proceedings continue, but Tamari argues that Section 7a(11) prohibited the CBOT from conducting the arbitration. The district court relied on Section 4a, note, the savings provision, providing that pending arbitration proceedings were not to be abated by the Section 5a(11) amendment. Tamari interprets the act as prohibiting arbitration of claims in excess of $15,000.00, and since the claims of Bache and counterclaim of Tamari each exceeds that limitation, Tamari argues the controversy could no longer be arbitrated. Tamari also leans heavily on *Wilko v. Swan*, 346 U.S. 427 (1953), a securities case, as analogous federal authority supporting the application of Section 7a(11) to this case to prevent arbitration. In *Wilko* the court held that an agreement for arbitration of any controversy that might arise in the future between the parties was void under Section 14 of the Securities Act of 1933 notwithstanding the provisions of the Arbitration Act. Section 14 of the Securities Act[5] provides that "any condition, stipulation, or provision binding any person acquiring a security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void." The *Wilko* arbitration agreement was held, considering Congressional policy, to be a stipulation waiving the benefits of the Security Act and therefore void. Two justices dissented, refusing to find that the Section 14 anti-waiver provision was a general limitation on the Arbitration Act. The Commodity Exchange Act, however, has no provision comparable to Section 14 of the Securities Act of 1933. Tamari similarly cites *Danford v. Schwabacher*, 342 F.Supp. 65 (N.D. Calif. 1972), *appeal dismissed*, 488 F.2d 454 (9th Cir. 1974),

[5] 15 U.S.C. § 77n.

and *Laupheimer v. McDonnell & Co., Inc.*, 500 F.2d 21 (2d Cir. 1974), both securities cases. *Danford* and *Laupheimer* are cases in which the respective plaintiff each claimed to have been induced by fraud to become a partner or officer in brokerage firms in order for the firms to gain control over the customer account of each. Both firms were in financial difficulty and by joining the firms each plaintiff found himself thereby subject to arbitration agreements. Both cases refused to enforce the arbitration agreements in the subsequent disputes, but both cases turned on *Wilko's* interpretation of the Securities Act of 1933 with its Section 14 waiver provision with which we are not faced. The Securities Exchange Act of 1934 likewise contains a similar waiver provision, 15 U.S.C. 78cc(a).

No judicial interpretation has been cited or found interpreting Section 7a(11) in similar circumstances, except an interlocutory Memorandum and Order of the United States District Court for the Northern District of California in *Milani v. Conti-Commodity Service*, entered October 26, 1976, COMM. FUT. L. REP. (CCH) ¶ 20,227, and cited by Tamari.[6] However, we read that order as taking the view that Section 7a(11) does not prohibit compulsory arbitration agreements over and above or in addition to the arbitration requirements of the Act. *Milani* does, however, extend the *Wilko* rationale to commodities cases by holding that an agreement to arbitrate future commodity disputes is not enforceable. The Tamari complaint does not allege that particular deficiency, although it is argued. In any event we decline to legislate a Section 14 provision into the Commodities Act.

Bache does not read Section 7a(11) as prohibiting contract markets[7] from providing such other arbitration

[6] This case is set for trial in the fall of 1977.

[7] Contract market is defined as an Exchange or Board of Trade where futures contracts are traded and so designated by the Secretary of Agriculture. A convenient glossary of terms used in commodity futures trading may be found at (1974) U.S. CODE CONG. & AD. NEWS 5891-94.

facilities as they may see fit and as may be agreed to in addition to what the act mandates. Such is also the view of the Commodity Futures Trading Commission.[8] Bache also relies on the Commission's view that Section 7a(11) does not preclude arbitration of customer claims in amounts in excess of $15,000,[9] and that arbitration proceedings on April 21, 1975, the effective date of the amendment, are not abated by Section 7a(11).[10] The administering agency's statutory construction is entitled to great deference, but independently we would have reached the same conclusion. *Kupiec v. Republic Federal Savings & Loan Association*, 512 F.2d 147 (7th Cir. 1975). In our view, for the reasons urged by Bache, Section 7a(11) is not applicable in any way, but even if it were, we view the proceedings as having been pending on April 21, 1975, and thus subject to the broad saving provision, Section 4a, note, as the district court held. Tamari alleges that on or about February 4, 1974, the dispute arose and was docketed with the CBOT Arbitration Committee prior to the date of the amendment. Thereafter, Tamari filed its own claim in the proceedings and evidence was heard. In our view the pending arbitration was not prohibited by the Act.[11]

[8] CFTC Interpretation, COMM. FUT. L. REP. (CCH) ¶ 6507, p. 6304, Question (5) (40 Fed. Reg. 29121).

[9] CFTC Interpretative Bulletin, July 2, 1975 (FR Doc. 75-17885, filed 7-9-75).

[10] CFTC Letter No. 75-1; COMM. FUT. L. REP. (CCH) ¶ 20,-088.

[11] The dissent states that *Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith Inc.* 558 F.2d 831 (7th Cir. 1977), ought to control this case. *Weissbuch* is also a securities case under the Securities Exchange Act of 1934 which contains a waiver provision. *Weissbuch*, however, in extending *Wilko* to 10b-5 situations under the 1934 Act does so only after noting the absence of international concerns which were the decisive factor in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974). In *Scherk*, the Supreme Court held that an international agreement containing an arbitration agreement was enforceable against a claim arising under Rule 10b-5 of the 1934 Act, declining to apply the *Wilko* rationale in such circumstance.

(Footnote continued on following page)

II.

Tamari also argues that estoppel should have barred CBOT from arbitrating the dispute because it vacillated over the meaning of the Section 7a(11) amendment to the Commodity Exchange Act. First CBOT, it is alleged, questioned its own jurisdiction and asked the parties for waivers which Tamari refused to provide. Then CBOT changed its opinion and decided to proceed with arbitration without waivers. In the meantime, Tamari filed the first of its suits, its alleged change of position. We see no merit in this contention. CBOT was not a party to the alleged agreement between the parties to arbitrate and did no more than by a legal opinion question for a short period of time its own jurisdiction under the recent amendment to the Act, a jurisdictional view which Tamari urges us to adopt. Tamari does not allege that CBOT acted fraudulently, with intended deception, or with culpable negligence. *Crary v. Dye*, 208 U.S. 515 (1907); *California State Board of Equalization v. Coast Radio Products*, 228 F.2d 520 (9th Cir. 1955). Tamari cites *Dickerson v. Calgrone*, 100 U.S. 578 (1880), to support its view, but that case also requires fraud or falsehood to justify estoppel. The good faith effort to interpret a new statutory amendment did not give rise to estoppel.

III.

Next Tamari attacks the finding expressed in the preliminary opinion by the district court that a valid agreement to arbitrate existed. The district court may have taken into consideration the allegations and exhibits in defendant's Petition to Stay the Proceedings

[11] *continued*
The parties have not raised a similar international agreement issue, but it appears from the complaint the plaintiffs are residents of Lebanon and the defendants are corporations in the United States. It is further alleged that the transactions about which plaintiff complains were initiated in Lebanon and concluded in the United States. Thus, it appears following *Scherk* that the international aspects of the agreement and controversy further support the trial court's ruling.

Pending the Completion of the Arbitration which set forth an alleged exchange of cables between the parties agreeing to arbitrate which was subsequent to the original agreement to arbitrate. The cables purport to show the further development and consummation of the agreement to arbitrate. In the face of Tamari's allegations that its appearance at the arbitration resulted from the defendant's fraud and coercion, and attacking the original total agreement for fraud, the validity of the arbitration process was not subject to final resolution merely on the record as it then stood. The finding of a valid arbitration agreement was error, but harmless and it does not necessarily control the appropriateness of the dismissal. Since this case was dismissed, the order to arbitrate was of no effect.

Tamari argues that the alleged fraud and coercion leading to its presence at arbitration was a question to be resolved by the courts and not by arbitration. The original arbitration clauses providing that any controversies arising were to be settled by arbitration were only parts of two total agreements relating to the accounts. Tamari does not allege specifically that it agreed to the arbitration clause due to fraud. Tamari specifically, however, alleges that Bache's misrepresentations that Bache was expert in handling commodity futures trading, analyzing the market and forecasting trends, induced Tamari to enter into the agreements which contained the arbitration clauses. In addition, Tamari generally alleges that the submission of its claim and its appearance at arbitration was due to fraud and coercion. In the complaint filed in the first Tamari suit (a copy of which was attached and incorporated as an exhibit in this second suit), Tamari asked the court to rescind all the agreements between the parties and to award Tamari compensatory and exemplary damages and fees and costs. Under broad arbitration agreements the issue of fraud generally in inducing the complete principal agreement is a suitable matter for arbitration. *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967); *Hamilton Life Ins. Co. of New York v. Republic National Life Ins. Co.*, 408 F.2d 606 (2d Cir. 1969).

In *Prima*, the court adheres to the view that "except where the parties otherwise intend—arbitration clauses as a matter of federal law are 'separable' from the contracts in which they are embedded, and where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud." 388 U.S. at 402. The court notes that this view honors "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." Tamari does not allege that the arbitration clause was separate or that any legal issues which might arise were to be excluded from arbitration.

Tamari's alleged coerced appearance suggests some circumstances related to arbitration arising subsequent to the original agreements to arbitrate. Any such questions about the arbitration proceedings themselves are appropriate for the arbitration committee to consider and are in any event premature under the Arbitration Act. The district court could not find the arbitration agreement valid on the pleadings. That determination had to be left for arbitration of the total original contract, but it could take into consideration that the arbitration agreement itself had not been directly attacked in the complaint.

IV.

Next Tamari complains that the district court violated due process by its *sua sponte* dismissal of the complaint without notice and hearing. There was adequate notice contained in the Preliminary Opinion of April 21, 1976, in which it was stated that in the court's view the case should be dismissed as to the parties before that court. On May 19, 1976, without anything further being heard from Tamari, it was dismissed. The procedure was not ideal, but it is sufficient to withstand Tamari's attack.

V.

Tamari also argues that there was a conflict of interest within the CBOT which precluded fair arbitra-

tion. This arises from the alleged fact that Tamari itself had filed a complaint with another committee of CBOT charging Bache with violations of the Commodity Exchange Act and certain CBOT Rules and Regulations. Tamari then argues CBOT should not be both investigator and arbitrator. Part, at least, of any such alleged conflict was the result of Tamari's own action after the CBOT arbitration proceedings had been initiated. That complaint was filed with a separate committee, not the arbitration committee. We see no merit in this premature objection.

VI.

Finally, Tamari argues that there was misconduct in the arbitration proceedings as the arbitration committee was drawn from an interest group to which Bache, not Tamari, belonged and that Bache was powerful and influential in that group. It was the district court's view that that type of complaint was reviewable only under Section 10 of the Federal Arbitration Act. We agree.

VII.

The resolution of those particular issues framed by Tamari is sufficient to resolve the issue of dismissal. In addition, however, the dismissal may also be viewed as the exercise of the trial court's discretion in dismissing the one count complaint seeking declaratory relief. The question is not without some difficulty as the issues are clouded. With four separate federal cases and an arbitration proceeding growing out of the basic dispute, the litigation is fractured and in some disarray. It is not a good situation for the expeditious and efficient resolution of the underlying controversy. We attach no more significance to the district court's joint preliminary opinion so far as it may have applied to this case than to view it as showing in whole or in part what may have been considered by the court in the exercise of its discretion. To the extent that we can determine the basis of the trial court's ruling, we are bound to affirm even when that ruling may have been based upon an inappropriate ground or a wrong reason. *Sapp v. Renfroe*, 511 F.2d 172 (5th Cir. 1975).

Certain considerations are readily apparent from Tamari's complaint. First, as Tamari alleges, the dispute between Tamari and Bache was docketed with the Arbitration Committee of CBOT on or about February 4, 1974. In that proceeding Tamari sought to recover $2,150,000 from Bache and Bache sought to recover $376,366.96 from Tamari. Tamari next filed with the Business Conduct Committee of CBOT a complaint against Bache alleging substantially the same losses. Tamari then filed its first suit on December 10, 1975, for the same $2,150,000 damages plus exemplary damages and costs. The CBOT Arbitration Committee, after consideration of jurisdictional problems, proceeded to take evidence on December 11, 1975. Then during the arbitration proceedings, on January 6, 1976, Tamari filed this second suit to halt the arbitration. Therefore, at that point Tamari was already engaged in three proceedings over the same dispute, one federal case (not counting the present suit), one arbitration proceeding and one other complaint with CBOT.

"The pendency of another action involving the same set of circumstances has often been of determinative importance in the exercise of judicial discretion." (6A MOORE'S FEDERAL PRACTICE ¶ 57.08[6-1] (2nd ed. 1974)). That has been recognized as a decisive judicial discretion factor in this circuit even where the parties in the other pending action were not the same as the parties in the dismissed action. *National Health Federation v. Weinberger*, 518 F.2d 711 (7th Cir. 1975). See also *Abbott Laboratories v. Gardner*, 387 U.S. 130, 155 (1967); *Samuels v. Mackell*, 401 U.S. 66, 70. We do not adhere to a chronological test rigidly applied, but it may be one of other factors affecting discretion. *Chicago Furniture Forwarding Co. v. Bowles*, 161 F.2d 411 (7th Cir. 1947). We are concerned with whether or not the declaratory relief sought "will more fully serve the needs and convenience of the parties and provide a comprehensive solution of the general conflict." (10 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 2758 at 779 (1973)). In our view the declaratory relief sought could not meet that test. It could not provide a comprehensive solution of the underlying dispute nor any substantial part of it.

The basic dispute would remain unresolved. *Public Service Commission v. Wycoff Co.*, 344 U.S. 237 (1952). The court may also in the exercise of its discretion consider that "the wholesome purposes of declaratory acts would be aborted by its use as an instrument of procedural fencing either to secure delay or to choose a forum." *American Automobile Ins. Co. v. Freundt*, 103 F.2d 613, 617 (7th Cir. 1939). Further, the district court lacked authority to interfere with arbitration proceedings already in progress. The power of the district court to review arbitration proceedings is governed by Section 10 of the Federal Arbitration Act. The fourth suit filed by Tamari on January 27, 1977, in the district court and now pending, seeks to review and set aside that arbitration award. We do not favor a "piecemeal trial." *TRW, Inc. v. Ellipse Corp.*, 495 F.2d 314 (7th Cir. 1974).

In reviewing the exercise of discretion by the district court, we adhere to the standard adopted in *Beshear v. Weinzapfel*, 474 F.2d 127 (7th Cir. 1973).

> Generally, an appellate court may set aside a trial court's exercise of discretion only if the exercise of such discretion could be said to be arbitrary. [D]iscretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. (citations omitted)

In the particular circumstances of this case, we find no abuse of discretion under the applicable standard.

WE AFFIRM.

SWYGERT, *Circuit Judge*, dissenting. I respectfully dissent. The crucial issue in this case is whether Tamari should be compelled to comply with the agreement to arbitrate disputes which was part of the contracts it signed upon opening two accounts with Bache. The contracts, one of which is reproduced on pages 19 and 20 of this opinion, were printed form documents which were obviously used by Bache for every account opened by a customer. The arbitration clause, which is paragraph 14 of the contract, was not the result of arm's length bargaining between Tamari and Bache. Rather, it is apparent that the arbitration clause was a mandatory feature of Bache's standard customer agreement, and that a customer could not purchase commodities futures through Bache unless he agreed to it.[1]

The issue of whether to enforce a contract of adhesion between parties of unequal bargaining power is a difficult one. *See, e.g., Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965). I am convinced, however, that under the circumstances of this case the agreement to arbitrate should not be enforced.

The gravamen of Tamari's complaint is that Bache committed fraudulent acts which violated the Commodity Exchange Act. The antifraud provisions of the Act, 7 U.S.C. §§ 6b, 6*o*, are designed to protect individual investors in a complex area of the financial world where they easily can be cheated by sophisticated insiders. The legislative history of the most recent amendments to the Act makes clear that one of the Act's primary purposes is to protect the public:

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[1] Even if the assumption that these were adhesion contracts was open to serious question, which I doubt, we must assume that the set of facts most favorable to Tamari is true because this case was decided on a motion to dismiss.

PLEASE READ BOTH SIDES BEFORE SIGNING

BACHE & Co.
INCORPORATED

CUSTOMER'S AGREEMENT

1. I agree as follows with respect to all of my accounts, in which I have an interest alone or with others, which I have opened or open on the future, with you for the purchase and sale of securities and commodities:

2. I am of full age and represent that I am not an employee of any exchange or of a member firm of any Exchange or the NASD, or of a bank, trust company, or insurance company and that I will promptly notify you if I become so employed.

3. All transactions for my account shall be subject to the constitution, rules, regulations, customs and usages, as the same may be constituted from time to time, of the exchange or market (and its clearing house, if any) where executed.

4. Any and all credit balances, securities, commodities or contracts relating thereto, and all other property of whatsoever kind belonging to me or in which I may have an interest held by you or carried for my accounts shall be subject to a general lien for the discharge of my obligations to you (including unmatured or contingent obligations) however arising and without regard to whether or not you have made advances with respect to such property and without notice to me may be carried in your general loans and all securities may be pledged, repledged, hypothecated or re-hypothecated, separately or in common with other securities or any other property, for the sum due to you thereon or for a greater sum and without retaining in your possession and control for delivery a like amount of similar securities or other property. At any time and from time to time you may, in your discretion, without notice to me, apply and/or transfer any securities, commodities, contracts relating thereto, cash or any other property therein, interchangeably between any of my accounts, whether individual or joint or for any of my accounts to any account guaranteed by me. You are specifically authorized to transfer to my cash account on the settlement day following a purchase any cash in that account, excess funds available in any of my other accounts, including but not limited to any free balances in any margin account or in any non-margin commodities account, sufficient to make full payment of this cash purchase. I agree that any debit occurring in any of my accounts may be transferred by you at your option to my margin account.

5. I will maintain such margins as you may in your discretion require from time to time and will pay on demand any debit balance owing with respect to any of my accounts. Whenever in your discretion you deem it desirable for your protection, (and without the necessity of a margin call) including but not limited to an instance where a petition in bankruptcy or for the appointment of a receiver is filed by or against me, or an attachment is levied against my account, or in the event of notice of my death or incapacity, or in compliance with the orders of any Exchange, you may, without prior demand, tender, and without any notice of the time or place of sale, all of which are expressly waived, sell any or all securities, or commodities or contracts relating thereto which may be in your possession, or which you may be carrying for me, or buy any securities, or commodities or contracts relating thereto of which my account or accounts may be short, in order to close out in whole or in part any commitment in my behalf or you may place stop orders with respects to such securities or commodities and such sale or purchase may be made at your discretion on any Exchange or other market where such business is then transacted, or at public auction or private sale, with or without advertising and no demands, calls, tenders or notices which you may make or give in any one or more instances shall invalidate the aforesaid waivers on my part. You shall have the right to purchase for your own account any or all of the aforesaid property at any such sale, discharged of any right of redemption, which is hereby waived.

6. All orders for the purchase or sale of commodities for future delivery may be closed out by you as and when authorized or received by the Exchange where made. Against a "long" position in any commodity contract, prior to maturity thereof, and at least five business days before the first notice day of the delivery month, I will give instructions to liquidate, or place you in sufficient funds to take delivery; and in default thereof, or in the event such liquidating instructions cannot be executed under prevailing conditions, you may, without notice or demand, close out the contracts or take delivery and dispose of the commodity upon any terms and by any method which may be feasible. Against a "short" position in any commodity contract, prior to maturity thereof, and at least five business days before the last trading day of the delivery month, I will give you instructions to cover, or furnish you with all necessary delivery documents; and in default thereof, you may without demand or notice, cover the contracts, or if orders to buy in such contracts cannot be executed under prevailing conditions, you may procure the actual commodity and make delivery thereof upon any terms and by any method which may be feasible.

7. All transactions in any of my accounts are to be paid for or required margin deposited no later than 2:00 p.m. on the settlement date.

8. I agree to pay interest and service charges upon my accounts monthly at the prevailing rate as determined by you.

9. I agree that, in giving orders to sell, all "short" sale orders will be designated as "short" and all "long" sale orders will be designated as "long" and that the designation of a sell order as "long" is a representation on my part that I own the security and, if the security is not in your possession that it is not then possible to deliver the security to you forthwith and I will deliver it on or before the settlement date.

10. Reports of the execution of orders and statements of my account shall be conclusive if not objected to in writing within five days and ten days, respectively, after transmittal to me by mail or otherwise.

CUSTOMER'S AGREEMENT	ACCOUNT NAME (HEREIN REFERRED TO AS I)	OFFICE	ACC. NO.	R.R.	DATE
		HP	01564	16	197- May, 20th

11. All communications including margin calls may be sent to me at my address given you, or at such other address as I may hereafter give you in writing, and all communications so sent, whether in writing or otherwise, shall be deemed given to me personally, whether actually received or not.

12. No waiver of any provision of this agreement shall be deemed a waiver of any other provision, nor a continuing waiver of the provision or provisions so waived.

13. I understand that no provision of this agreement can be amended or waived except in writing signed by an officer of your Company, and that this agreement shall continue in force until its termination by me is acknowledged in writing by an officer of your Company; or until written notice of termination by you shall have been mailed to me at my address last given you.

14. This contract shall be governed by the laws of the State of New York, and shall inure to the benefit of your successors and assigns, and shall be binding on the undersigned, his heirs, executors, administrators and assigns. Any controversy arising out of or relating to my account, to transactions with or for me or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules then obtaining of either the American Arbitration Association or the Board of Governors of the New York Stock Exchange as I may elect, except that any controversy arising out of or relating to transactions in commodities or contracts relating thereto, whether executed or to be executed within or outside of the United States shall be settled by arbitration in accordance with the rules then obtaining of the Exchange (if any) where the transaction took place, if within the United States, and provided such Exchange has arbitration facilities or under the rules of the American Arbitration Association as I may elect. If I do not make such election by registered mail addressed to you at your main office within five days after demand by you that I make such election, then you may make such election. Notice preliminary to, in conjunction with, or incident to such arbitration proceeding, may be sent to me by mail and personal service is hereby waived. Judgment upon any award rendered by the arbitrators may be entered in any court having jurisdiction thereof, without notice to me.

15. If any provision hereof is or at any time should become inconsistent with any present or future law, rule or regulation of any securities or commodities exchange or of any sovereign government or a regulatory body thereof and if any of these bodies have jurisdiction over the subject matter of this agreement, said provision shall be deemed to be superseded or modified to conform to such law, rule or regulation, but in all other respects this agreement shall continue and remain in full force and effect.

DATE _____ CUSTOMER'S SIGNATURE Bache & Co. Frank W. Tarman _____
FRANK W. TARMAN & SONS CO.

LENDING AGREEMENT

YOU AND ANY FIRM SUCCEEDING TO YOUR FIRM ARE HEREBY AUTHORIZED FROM TIME TO TIME TO LEND SEPARATELY OR TOGETHER WITH THE PROPERTY OF OTHERS EITHER TO YOURSELVES OR TO OTHERS ANY PROPERTY WHICH YOU MAY BE CARRYING FOR ME ON MARGIN. THIS AUTHORIZATION SHALL APPLY TO ALL ACCOUNTS CARRIED BY YOU FOR ME AND SHALL REMAIN IN FULL FORCE UNTIL WRITTEN NOTICE OF REVOCATION IS RECEIVED BY YOU AT YOUR PRINCIPAL OFFICE IN NEW YORK.

DATE _____ CUSTOMER'S SIGNATURE Bache & Co. Frank W. Tarman _____
FRANK W. TARMAN & SONS CO.

SIGN IN BOTH PLACES

KINDLY SIGN THIS FORM IN THE TWO SIGNATURE SPACES INDICATED ABOVE. IN THE CASE OF JOINT ACCOUNTS, BOTH TENANTS SHOULD SIGN IN BOTH SIGNATURE SPACES. RETURN THIS ORIGINAL (WHITE) TO THE BACHE OFFICE WHICH SERVICES YOUR ACCOUNT. THE DUPLICATE (BUFF) SHOULD BE RETAINED FOR YOUR PERSONAL RECORDS.

FORM 1441 C-2 (1-68)

PLEASE READ BOTH SIDES BEFORE SIGNING

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> The present Commodity Exchange Act is predicated upon findings and conclusions of the Congress that (1) transactions in commodity futures are carried on in large volume by the public, as well as by persons engaged in the business of buying and selling agricultural commodities in interstate commerce, and (2) such transactions and prices are susceptible to speculation, manipulation and control, and sudden and unreasonable price fluctuations, and such fluctuations are a burden upon interstate commerce and make regulation essential in the public interest. A fundamental purpose of the Commodity Exchange Act is to insure fair practice and honest dealing on the commodity exchanges and to provide a measure of control over those forms of speculative activity which too often demoralize the markets to the injury of producers and consumers and the exchanges themselves. S. Rep. No. 93-1131, 93d Cong., 2d Sess., 1974 U.S. Code Cong. & Ad. News 5843, 5856.

Given the congressional mandate to protect the individual commodities investor, the courts should not permit the dismissal of complaints alleging fraud by a commodities broker on the basis of an adhesion contract drafted by that broker. We can be confident that, if the commodities brokers as a class can compel the arbitration of antifraud claims rather than litigating them in court, they will do so. The arbitrators before whom the complaints would be filed would also be insiders in the commodities industry, and would tend to be more tolerant of questionable practices by brokers than would a judge who is an outsider to the field. But the individual investor is entitled to have his claim decided by an outsider. It contravenes the spirit of the Act and undermines its remedial purposes to remand the investor who contends a broker has committed fraud to a committee composed of other brokers on the basis of an arbitration clause in an adhesion contract.

It was precisely this problem which motivated the Supreme Court's decision in *Wilko v. Swan*, 346 U.S. 427 (1953). The majority distinguishes *Wilko* because

there is no analogue in the Commodity Exchange Act to section 14 of the Securities Act of 1933. But it is clear from the opinion in *Wilko* that a major underpinning of the Court's holding was also the vulnerability of an individual investor to being manipulated by insiders in the securities industry. 346 U.S. at 435.

Moreover, this court has recently extended the broad policy of investor protection contained in *Wilko* to a case in which section 14 of the Securities Act was not implicated. In *Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 558 F.2d 831 (7th Cir. 1977), the issue was whether plaintiffs' claim that defendant violated Rule 10b-5 promulgated under the Securities Exchange Act of 1934 had to be dismissed because an agreement to arbitrate all disputes was contained in the adhesion contract which plaintiffs signed upon opening their account with defendant. We noted that *Wilko* was distinguishable because the private right of action under Rule 10b-5 was judicially created, while the private right of action under section 12(a) of the Securities Act is explicitly provided for by the statute. Therefore, the Securities Exchange Act lacks the "special right" which the *Wilko* Court held existed under the Securities Act and could not be waived under section 14 of that Act. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 513-14 (1974).[2] Nonetheless, we refused to enforce the arbitration clause because it was not the product of actual bargaining between the parties and enforcement would undermine the policy contained in the Securities Exchange Act of protecting the individual investor who "is most vulnerable to securities swindles." 558 F.2d at 835.

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[2] The majority asserts that *Scherk* mandates enforcement of an arbitration agreement whenever "international concerns" are involved. This reading stretches *Scherk* well beyond the range of cases to which the Supreme Court intended it to apply. The holding of *Scherk* was that in a truly international contract, one "touching two or more countries, each with its own substantive laws and conflict-of-law rules," the failure to enforce an arbitration agreement would unfairly exalt American law of other countries. 417 U.S. at 516. This case does not pose the problem of a conflict between American law and foreign law. The contract negotiated by Tamari and Bache involved purely American business dealings, and it is clear that the parties intended American law to govern any disagreement.

Our conclusion in *Weissbuch* was previously reached by other courts which have considered the identical issue. *Ayres v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 538 F.2d 532, 536 (3d Cir.), *cert. denied*, 429 U.S. 1010 (1976); *Macchiavelli v. Shearson, Hammill & Co.*, 384 F. Supp. 21, 27-28 (E.D. Cal. 1974). In addition, *Wilko* has been extended to the antitrust area, in which no analogue to section 14 exists. *Power Replacements, Inc. v. Air Preheater Co.*, 426 F.2d 980 (9th Cir. 1970).

In my judgment *Weissbuch* ought to control the case at bar. There is no logical way to distinguish the plight of the individual securities investor and the individual commodites investor. Both are vulnerable to fraudulent schemes perpetrated by industry insiders. Congressional concern for the individual investor is no greater in the Securities Exchange Act than it is in the Commodity Exchange Act. Finally, the danger that arbitration will frustrate the intent of Congress is no greater in the securities industry than it is in the commodities industry. I therefore agree with the court in *Milani v. ContiCommodity Services, Inc.*, [1976] Commodity Futures L. Rep. (CCH) ¶ 20,227 (N.D. Cal. 1976), that enforcement of arbitration agreements such as the one in the case at bar would undermine the scheme of investor protection which Congress has enacted in the Commodity Exchange Act.

The Commodities Futures Trading Commission has recognized the unfairness of allowing brokers to utilize adhesion contracts to provide for compulsory arbitration of customer grievances. As early as 1975, the Commission issued an interpretative statement which discussed proposed amendments to the rules which the Commission is authorized to promulgate under the Act, and stated:

> As already noted, one factor leading to passage of the CFTC Act was allegations made in court cases and newspaper articles that the arbitration procedures of contract markets had been unfairly applied. The Commission believes that the procedural protections contained in the amended proposed rules will prevent the possibility of abuses such as those alleged in the congressional hearings. The voluntary nature of procedures established by contract markets is a central part of this protection. *A contract of adhesion, or an uninformed waiver of rights, is not a voluntary agreement, as customers may not be fully cognizant of the effects of an agreement to arbitrate until the claim or grievance arises.* The amended proposed rule, therefore, provides that the parties' agreement to submit the claim or grievance to the procedure must have been made after the claim or grievance arose. [1976] Commodity Futures L. Rep. (CCH) ¶ 20, 111, at 20,805 (emphasis added).

The Commission has now established a rule which generally prohibits the arbitration of grievances unless the customer agrees to arbitrate after the time the grievance has arisen. 17 C.F.R. § 180.3(a).[3] The rule per-

[3] 17 C.F.R. § 180.3 provides, in relevant part:

Voluntary Procedure and Compulsory Payments.

(a) The use by customers of the dispute settlement procedures established by contract markets pursuant to the Act or this Part or of the arbitration or other dispute settlement procedures specified in an agreement under paragraph (b)(3) of this section shall be voluntary. The procedures so established shall prohibit any agreement or understanding pursuant to which customers of members of the contract market agree to submit claims or grievances for settlement under said procedures prior to the time when the claim or grievance arose, except in accordance with paragraph (b) of this section.

(b) No futures commission merchant, floor broker or associated person shall enter into any agreement or understanding with a customer in which the customer agrees, prior to the time the claim or grievance arises, to submit such claim or grievance to any settlement procedure except as follows:

(1) Signing the agreement must not be made a conditon for the customer to utilize the services offered by the futures commission merchant, floor broker or associated person;

(2) If the agreement is contained as a clause or clauses of a broader agreement, the customer must separately endorse the clause or clauses containing the cautionary language and other provisions specified in this section;

(Footnote continued on following page)

mits compulsory arbitration to be provided for in the initial contract between the broker and the customer only if: (1) agreeing to compulsory arbitration is not a

[3] *continued*

(3) The agreement may not require the customer to waive the right to seek reparations under Section 14 of the Act and Part 12 of these regulations. Accordingly, the customer must be advised in writing that he or she may seek reparations under Section 14 of the Act by an election made within 45 days after the futures commission merchant, floor broker or associated person notifies the customer that arbitration will be demanded under the agreement. This notice must be given at the time when the futures commission merchant, floor broker or associated person notifies the customer of an intention to arbitrate. The customer must also be advised that if he or she seeks reparations under Section 14 of the Act and the Commission declines to institute reparation proceedings, the claim or grievance will be subject to the preexisting arbitration agreement and must also be advised that aspects of the claims or grievances that are not subject to the reparations procedure (*i. e.* do not constitute a violation of the Act or rules thereunder) may be required to be submitted to the arbitration or other dispute settlement procedure set forth in the preexisting arbitration agreement.

(4) The customer agreement must contain cautionary language, printed in large boldface type, to the following effect:

WHILE THE COMMODITY FUTURES TRADING COMMISSION (CFTC) RECOGNIZES THE BENEFITS OF SETTLING DISPUTES BY ARBITRATION, IT REQUIRES THAT YOUR CONSENT TO SUCH AN AGREEMENT BE VOLUNTARY. YOU NEED NOT SIGN THIS AGREEMENT TO OPEN AN ACCOUNT WITH [name]. See 17 CFR 180.1-180.6.

BY SIGNING THIS AGREEMENT, YOU MAY BE WAIVING YOUR RIGHT TO SUE IN A COURT OF LAW, BUT YOU ARE NOT WAIVING YOUR RIGHT TO ELECT AT A LATER DATE TO PROCEED PURSUANT TO SECTION 14 OF THE COMMODITY EXCHANGE ACT TO SEEK DAMAGES SUSTAINED AS A RESULT OF A VIOLATION OF THE ACT. IN THE EVENT A DISPUTE ARISES, YOU WILL BE NOTIFIED IF [name] INTENDS TO

(Footnote continued on following page)

prerequisite to using the broker's services; (2) the customer separately endorses the compulsory arbitration clause; (3) the contract contains boldface type warning the customer that he need not agree to compulsory arbitration of disputes in order to use the broker's services. 17 C.F.R. § 180.3(b).

If this rule were applicable to the case at bar, the district court's judgment would have to be reversed, because the compulsory arbitration clause contained in the contracts between Tamari and Bache does not satisfy the requirements of 17 C.F.R. § 180.3(b). Admittedly, the rule is inapplicable because as finally amended it did not become effective until January 18, 1977. But it strikes me as unfair to penalize Tamari simply because the rule was not yet in effect at the time Tamari entered its relationship with Bache. The principle underlying the rule is that it is always unfair for a broker to coerce a customer into agreeing to the compulsory arbitration of grievances through the use of adhesion contracts. That principle was as valid in 1972, when the contracts were signed, as it is now. It would in no way defeat Bache's legitimate expectations to refuse to enforce the arbitration clause. What the rule makes clear is that Bache never had a legitimate right to coerce its customers into agreeing to compulsory arbitration.

In my opinion, we should use our equitable powers to bridge the remedial gap which now exists for commodities transactions entered into before January 18,

[3] *continued*

SUBMIT THE DISPUTE TO ARBITRATION. IF YOU BELIEVE A VIOLATION OF THE COMMODITY EXCHANGE ACT IS INVOLVED AND IF YOU PREFER TO REQUEST A SECTION 14 "REPARATIONS" PROCEEDING BEFORE THE CFTC, YOU WILL STILL HAVE 45 DAYS IN WHICH TO MAKE THAT ELECTION.

(5) If the agreement specifies a forum for settlement other than a procedure established pursuant to section 5a(11) of the Act or this Part, the procedures of such forum must comply with the requirements of § 180.5 of this Part.

1977. As I have already noted, I would refuse to enforce the compulsory arbitration clause even in the absence of a CFTC rule. Given the existence of the rule, I believe that the majority's disposition of this case also contravenes the well-established policy that we should defer to the expertise of the administrative agency to which Congress has entrusted the regulation of a particular field.

I therefore would reverse the district court's order dismissing this action. Unless Tamari agreed to arbitration after the time its dispute with Bache arose, it should be permitted to present its claims to the district court. As the majority correctly points out, however, whether Tamari did so is a disputed issue of fact which should not be decided on a motion to dismiss.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 4272—Midwest Law Printing Co., Inc., Chicago—10-19-77—275

APPENDIX B

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

Name of Presiding Judge, Honorable John F. Grady

Cause No. 76-C-21 Date May 19, 1976

Title of Cause—Abdallah W. Tamari, et al. v. Bache & Co., et al.

For the reasons expressed in the court's Preliminary Opinion of April 21, 1976, the court finds that this complaint fails to state a claim upon which relief can be granted, and, accordingly, the complaint is dismissed.

Grady, J.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

ABDALLAH W. TAMARI, et al.,
Plaintiffs,
vs.
BACHE & CO. (LEBANON) S. A. L.,
a Lebanese corporation, et al.,
Defendants.
No. 75 C 4189

ABDALLAH W. TAMARI, et al.,
Plaintiffs,
vs.
BACHE & CO. (LEBANON) S. A. L.,
et al.,
Defendants.
No. 76 C 21

PRELIMINARY OPINION ON MOTIONS FOR STAY AND CONSOLIDATION

The Court has reached some preliminary conclusions on the motion of the plaintiff to stay the arbitration proceeding and the motion of the defendants to stay and consolidate both of these causes.

The Court believes that plaintiff and Bache Delaware (BD) entered into a valid arbitration agreement covering the kind of dispute presented in Case No. 75 C 4189. Therefore, pursuant to the provisions of the Federal Arbitration Act (9 U. S. C. § 3, 4), that cause must be stayed until completion of the arbi-

tration and plaintiff should be ordered to arbitrate. This result is not affected by the amendment of the Commodity Exchange Act, since there is a savings provision for "pending proceedings," and the arbitration which had been instituted before the Chicago Board of Trade was a pending proceeding.

As far as BD is concerned, the Court believes it should do more than simply stay Case No. 75 C 4189. Since the complaint in that cause prays for relief this Court cannot grant, the cause should be dismissed as to BD. The only judicial relief available to plaintiff would be under Section 10 of the Arbitration Act, and such an action would be premature at this time.

The matter is less clear as to the defendant Bache Lebanon (BL). This defendant does not appear to have signed the agreement providing for the arbitration, and it is not a party to the arbitration now pending. Unless the arbitration agreement is broad enough to cover all parties to the transactions covered by the agreements, there does not seem to be any obligation on the part of plaintiff to arbitrate its dispute with BL. In any case, BL is not a party to the arbitration and apparently has not sought to become a party.

BD argues that BL is simply its agent, and that therefore plaintiff has a complete remedy in the arbitration proceeding. The Court cannot determine at this point whether BL was in fact the agent of BD. Moreover, even if BL was the agent of BD, this does not necessarily mean that plaintiff has no independent cause of action against BL. An agent can be independently liable, along with his principal, especially in the kinds of transactions which are the subject of Case No. 75 C 4189. Therefore, the Court is not able at this time to conclude that Case 75 C 4189 should be stayed or dismissed insofar as the defendant BL is concerned.

The Court's preliminary impression, then, is that both causes should be dismissed as against BD, Case 76 C 21 should be dismissed as against the defendant Board of Trade, and that both

causes should then be consolidated as to the remaining defendant, BL.

The Court believes that oral argument, limited to the questions involving BL, would be helpful at this time. Counsel are requested to appear at 10:30 a.m. on April 28, 1976. If this time is not convenient, counsel may arrange another time with the minute clerk.

Dated: April 21, 1976.

/s/ JOHN F. GRADY
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 28, 1977

Before

HON. LUTHER M. SWYGERT, *Circuit Judge*
HON. HARLINGTON WOOD, JR., *Circuit Judge*
HON. A. SHERMAN CHRISTENSEN, *Senior District Judge**

ABDALLAH W. TAMARI, LUDWIG W. TAMARI and FARAH W. TAMARI, Co-partners doing business as WAHBE TAMARI & SONS CO., *Plaintiffs-Appellants,*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76-1728 *vs.*	No. 76 C 21
BACHE & CO. (LEBANON) S. A. L., a Lebanese corporation, BACHE & CO. INCORPORATED, a Delaware corporation, and the BOARD OF TRADE OF THE CITY OF CHICAGO, an Illinois corporation, *Defendants-Appellees.*	John F. Grady, Judge

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by plaintiffs-appellants, no judge in active service has requested a vote thereon, and a majority of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* Honorable A. Sherman Christensen, Senior Judge, United States District Court for the District of Utah, is sitting by designation.

Honorable Luther M. Swygert, Circuit Judge, voted that the petition for rehearing be granted.

APPENDIX E

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 9, 1977

Before

HON. HARLINGTON WOOD, JR., *Circuit Judge*

ABDALLAH W. TAMARI, LUDWIG W. TAMARI, etc.,
Plaintiffs-Appellants,

No. 76-1728 *vs.*

BACHE & CO. (LEBANON) S. A. L., a Lebanese corporation, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 76-C-21

Judge
John F. Grady

This matter comes before the court on the "PETITION FOR STAY OF MANDATE PENDING THE APPLICATION TO THE SUPREME COURT OF THE UNITED STATES FOR A WRIT OF CERTIORARI" filed herein on December 2, 1977 by counsel for the plaintiffs-appellants. On consideration thereof, this court being fully advised concerning the circumstances of this matter,

IT IS ORDERED that the mandate of this court is hereby STAYED to and including January 4, 1978, in accordance with the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure.

APPENDIX F

INDEX

CUSTOMER'S AGREEMENT	ACCOUNT NAME (HEREIN REFERRED TO AS I)	OFFICE	ACC. NO.	R.R.	DATE
	[illegible]	MP	01564	16	197[illegible] May, 20th

11. All communications including margin calls may be sent to me at my address given you, or at such other address as I may hereafter give you in writing, and all communications so sent, whether in writing or otherwise, shall be deemed given to me personally, whether actually received or not.

12. No waiver of any provision of this agreement shall be deemed a waiver of any other provision, nor a continuing waiver of the provision or provisions so waived.

13. I understand that no provision of this agreement can be amended or waived except in writing signed by an officer of your Company, and that this agreement shall continue in force until its termination by me is acknowledged in writing by an officer of your Company; or until written notice of termination by you shall have been mailed to me at my address last given you.

14. This contract shall be governed by the laws of the State of New York, and shall inure to the benefit of your successors and assigns, and shall be binding on the undersigned, his heirs, executors, administrators and assigns. Any controversy arising out of or relating to my account, to transactions with or for me or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules then obtaining of either the American Arbitration Association or the Board of Governors of the New York Stock Exchange as I may elect, except that any controversy arising out of or relating to transactions in commodities or contracts relating thereto, whether executed or to be executed within or outside of the United States shall be settled by arbitration in accordance with the rules then obtaining of the Exchange (if any) where the transaction took place, if within the United States, and provided such Exchange has arbitration facilities or under the rules of the American Arbitration Association as I may elect. If I do not make such election by registered mail addressed to you at your main office within five days after demand by you that I make such election, then you may make such election. Notice preliminary to, in conjunction with, or incident to such arbitration proceeding, may be sent to me by mail and personal service is hereby waived. Judgment upon any award rendered by the arbitrators may be entered in any court having jurisdiction thereof, without notice to me.

15. If any provision hereof is or at any time should become inconsistent with any present or future law, rule or regulation of any securities or commodities exchange or of any sovereign government or a regulatory body thereof and if any of these bodies have jurisdiction over the subject matter of this agreement, said provision shall be deemed to be superseded or modified to conform to such law, rule or regulation, but in all other respects this agreement shall continue and remain in full force and effect.

[illegible] & Co.

DATE _____ CUSTOMER'S SIGNATURE Ferdi W. Zaman _____

BAIBI. TAMAI & SONS CO.

LENDING AGREEMENT

YOU AND ANY FIRM SUCCEEDING TO YOUR FIRM ARE HEREBY AUTHORIZED FROM TIME TO TIME TO LEND SEPARATELY OR TOGETHER WITH THE PROPERTY OF OTHERS EITHER TO YOURSELVES OR TO OTHERS ANY PROPERTY WHICH YOU MAY BE CARRYING FOR ME ON MARGIN. THIS AUTHORIZATION SHALL APPLY TO ALL ACCOUNTS CARRIED BY YOU FOR ME AND SHALL REMAIN IN FULL FORCE UNTIL WRITTEN NOTICE OF REVOCATION IS RECEIVED BY YOU AT YOUR PRINCIPAL OFFICE IN NEW YORK.

[illegible] & Co.

DATE _____ CUSTOMER'S SIGNATURE Ferdi W. Zaman _____

BAIBI. TAMAI & SONS CO.

KINDLY SIGN THIS FORM IN THE TWO SIGNATURE SPACES INDICATED ABOVE. IN THE CASE OF JOINT ACCOUNTS, BOTH TENANTS SHOULD SIGN IN BOTH SIGNATURE SPACES. RETURN THIS ORIGINAL (WHITE) TO THE BACHE OFFICE WHICH SERVICES YOUR ACCOUNT. THE DUPLICATE (BUFF) SHOULD BE RETAINED FOR YOUR PERSONAL RECORDS.

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SIGN IN BOTH PLACES

EXHIBIT A

A35

BACHE & Co.
INCORPORATED

CUSTOMER'S AGREEMENT

1. I agree as follows with respect to all of my accounts, in which I have an interest alone or with others, which I have opened or open in the future, with you for the purchase and sale of securities and commodities:

2. I am of full age and represent that I am not an employee of any exchange or of a member firm of any Exchange or the NASD, or of a bank, trust company, or insurance company and that I will promptly notify you if I become so employed.

3. All transactions for my account shall be subject to the constitutions, rules, regulations, customs and usages, as the same may be constituted from time to time, of the exchange or market (and its clearing house, if any) where executed.

4. Any and all credit balances, securities, commodities or contracts relating thereto, and all other property of whatsoever kind belonging to me or in which I may have an interest held by you or carried for my accounts shall be subject to a general lien for the discharge of my obligations to you (including unmatured and contingent obligations) however arising and without regard to whether or not you have made advances with respect to such property and without notice to me may be carried in your general loans and all securities may be pledged, repledged, hypothecated or re-hypothecated, separately or in common with other securities or any other property, for the sum due to you thereon or for a greater sum and without retaining in your possession and control for delivery a like amount of similar securities or other property. At any time and from time to time you may, in your discretion, without notice to me, apply and/or transfer any securities, commodities, contracts relating thereto, cash or any other property thereto, interchangeably between any of my accounts, whether individual or joint or from any of my accounts to any account guaranteed by me. You are specifically authorized to transfer to my cash account on the settlement day following a purchase made in that account, excess funds available in any of my other accounts, including but not limited to any free balances in any margin account or in any non-regulated commodities account, sufficient to make full payment of this cash purchase. I agree that any debit occuring in any of my accounts may be transferred by you at your option to my margin account.

5. I will maintain such margins as you may in your discretion require from time to time and will pay on demand any debit balance owing with respect to any of my accounts. Whenever in your discretion you deem it desirable for your protection, (and without the necessity of a margin call) including but not limited to an instance where a petition in bankruptcy or for the appointment of a receiver is filed by or against me, or an attachment is levied against my account, or in the event of notice of my death or incapacity, or in compliance with the orders of any Exchange, you may, without prior demand, tender, and without any notice of the time or place of sale, all of which are expressly waived, sell any or all securities or commodities or contracts relating thereto which may be in your possession, or which you may be carrying for me, or buy any securities, or commodities or contracts relating thereto of which my account or accounts may be short, in order to close out in whole or in part any commitment in my behalf or you may place stop orders with respects to such securities or commodities and such sale or purchase may be made at your discretion on any Exchange or other market where such business is then transacted, or at public auction or private sale, with or without advertising and no demands, calls, tenders or notices which you may make or give in any one or more instances shall invalidate the aforesaid waivers on my part. You shall have the right to purchase for your own account any or all of the aforesaid property at any such sale, discharged of any right of redemption, which is hereby waived.

6. All orders for the purchase or sale of commodities for future delivery may be closed out by you as and when authorized or required by the Exchange where made. Against a "long" position in any commodity contract, prior to maturity thereof, and at least five business days before the first notice day of the delivery month, I will give instructions to liquidate, or place you in sufficient funds to take delivery; and in default thereof, or in the event such liquidating instructions cannot be executed under prevailing conditions, you may, without notice or demand, close out the contracts or take delivery and dispose of the commodity as you may terms and by any method which may be feasible. Against a "short" position in any commodity contract, prior to maturity thereof, and at least five business days before the last trading day of the delivery month, I will give you instructions to cover, or furnish you with all necessary delivery documents; and in default thereof, you may without demand or notice, cover the contracts, or if orders to buy in such contracts cannot be executed under prevailing conditions, you may procure the actual commodity and make delivery thereof upon any terms and by any method which may be feasible.

7. All transactions in any of my accounts are to be paid for or received margin deposited no later than 2:00 p.m. on the settlement date.

8. I agree to pay interest and service charges upon my accounts monthly at the prevailing rate as determined by you.

9. I agree that, in giving orders to sell, all "short" sale orders will be designated as "short" and all "long" sale orders will be designated as "long" and that the designation of a sell order as "long" is a representation on my part that I own the security and, if the security is not in your possession that it is not then possible to deliver the security to you forthwith and I will deliver it on or before the settlement date.

10. Reports of the execution of orders and statements of my account shall be conclusive if not objected to in writing within five days and ten days, respectively, after transmittal to me by mail or otherwise.

PLEASE READ BOTH SIDES BEFORE SIGNING

EXHIBIT B

14. This contract shall be governed by the laws of the State of New York, and shall inure to the benefit of your successors and assigns, and shall be binding on the undersigned, his heirs, executors, administrators and assigns. Any controversy arising out of or relating to my account, to transactions with or for me or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules then obtaining of either the American Arbitration Association or the Board of Governors of the New York Stock Exchange as I may elect, except that any controversy arising out of or relating to transactions in commodities or contracts relating thereto, whether executed or to be executed within or outside of the United States shall be settled by arbitration in accordance with the rules then obtaining of the Exchange (if any) where the transaction took place, if within the United States, and provided such Exchange has arbitration facilities or under the rules of the American Arbitration Association as I may elect. If I do not make such election by registered mail addressed to you at your main office within five days after demand by you that I make such election, then you make such election. Notice preliminary to, in conjunction with, or incident to such arbitration proceeding, may be sent to me by mail and personal service is hereby waived, Judgment upon any award rendered by the arbitrators may be entered in any court having jurisdiction thereof, without notice to me.

EXHIBIT C

NOTICE

Through the Notary Public Advocate Bassan Samara

Directed by

Bache and Co. Incorporated New York Through Its Attorney Roger Najjar

to

Wahbe Tamari and Sons Company
Beirut—Uruguay Street—Salamoun Bldg.

Greetings,

In my quality attorney of Messrs Bache and Co. Incorporated New York, by virtue of regular general power of attorney made in New York, legalized by the Lebanese Consulate General in New York on February 26, 1965 and by the Lebanese Ministry of Foreign Affairs Beirut on May 19, 1965 Numbered 30251.

Further to our telegram of December 22, 1973 by which we reminded you that you owe our principals the sum of Three Hundred Seventy-Six Thousand Three Hundred Sixty-Six U. S. Dollars and Ninety-Six Cents which is the total debit balances of your two commodity accounts, and called you to pay this amount to our principals within five days from the date of its notification to you.

In view of your reply by telegram on December 29, 1973 pretending that your company does not owe our principals the said amount.

In view of Article Fourteen of the two customers agreements signed by your company the first on May 20, 1972 and the second on September 22, 1972, clearly stipulates that any dispute between your company and my principals in connection with the accounts related to the margin agreements will be settled by arbitration, in accordance with the rules and regula-

tions in force in the exchange where transactions were made and it remains to your company to elect between the Board of Governors of the New York Stock Exchange or the American Association for Arbitration. Furthermore Article 14 stipulates that if you do not elect by registered letter to be addressed to the head office of my principals within five days from the date of demand, the right rests with my principals to do so.

Therefore, my principals call on you by this Notorial Notice to elect between the Board of Governors of the New York Stock Exchange and the American Arbitration Association to place the dispute in order to settle it in accordance with Article 14 of the Margin Agreement. If you do not comply within five days from the date of notification of this notice my principals will elect in your place any of the above arbitration chambers to expose the dispute with the purpose to settle it.

My principals reserve all rights of any kind towards your company.

Signed: ATTORNEY ROGER NAJJAR

EXHIBIT D

Advocate Roger Najjar Immeuble Fattal Beirut

In reply to your Notorial Notice of January 8th 1974 sent on behalf of your principals Messrs Bache and Co. Incorporated of New York this is to inform you that we accept arbitration in accordance with the terms of the customers agreement concluded with your principals stop pursuant to Clause 14 of the said agreement we request that the arbitration should take place in accordance with the rules of the exchange where our commodities transactions took place namely the Chicago Board of Trade stop we further request that the arbitration proceedings should include a claim of Two Million One Hundred and Fifteen Thousand US Dollars which we counterdemand from your principals and which our US Attorney will formulate in due course stop by a copy of this telegram sent by registered airmail to your principals we are informing them of the election we have made with regard to the Notice of the Arbitration of your principals claim and our counter demand stop with all reserves.

WAHBE TAMARI AND SONS COMPANY

EXHIBIT E

CHICAGO BOARD OF TRADE

ARBITRATION FORM

WHEREAS, Differences and controversies are now existing and pending between Bache & Co. Incorporated and Wahbe Tamari & Sons and Wahbe Tamari & Sons Co. in relation to business transactions.

Now we, the undersigned Wahbe Tamari & Sons and Wahbe Tamari & Sons Co. and Bache & Co. Incorporated aforesaid, desiring to avoid proceedings in the courts, do hereby mutually agree to submit the said differences and controversies for decision, in accordance with the rules of the Board of Trade of the City of Chicago to a quorum of the present "Committee of Arbitration" elected by said Board of Trade, or to substitutes for members of said Committee, as the case may be; and it is hereby understood and agreed by the parties hereto, that any award or finding of said arbitration shall be subject to appeal to the regular elected "Committee of Appeals" of said Board of Trade, as provided for appeals from the decisions of the "Committee of Arbitration."

And we do mutually covenant and agree, each with the other, that the award to be made by said Arbitrators, or "Committee of Appeals", shall be final and conclusively binding upon us and each of us, and further shall in all things, by us, and each of us, respectively, be well and faithfully kept and observed; and that we will stand to and abide by all the rules and regulations of said Board of Trade relating to Arbitrations, and be governed thereby, and well and truly pay, or cause to be paid, all costs assessments, or fines imposed upon us, or either of us, by said "Committee of Arbitration", or "Committee of Appeals", or by said "Rules and Regulations", and also, so far as shall be devolved upon us respectively, will faithfully perform and

fulfill the final award in the premises, without recourse to any other court or tribunal.

Provided, however, that the said award or finding shall be made in writing, signed by the Chairman of the Committee making the same, and shall be certified to by the Secretary of said Board of Trade, under the seal of said Board of Trade, and ready to be delivered to us, or to such of us as may desire and demand it, through said Secretary of said Board of Trade, as provided for in said "Rules and Regulations" within two business days after such decision shall have been made.

WITNESS, Our hands this 27th day of April A. D. 1974

Signed in presence of Khalil S. Zaed.

KHALIL S. ZAED 27/4/74

ABDALLAH W. TAMARI,
a general partner of both Wahbe Tamari & Sons and Wahbe Tamari & Sons Co.

BACHE & CO. INCORPORATED

by .....

Its ..... *President*

Attest: .....

Its ..... *Secretary*

EXHIBIT F

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

ABDALLAH W. TAMARI, LUDWIG W. TAMARI and FARAH W. TAMARI, co-partners doing business as WAHBE TAMARI & SONS CO., *Plaintiffs,* *vs.* BACHE & CO. (LEBANON) S. A. L., a Lebanese corporation, BACHE & CO. INCORPORATED, a Delaware corporation, and the BOARD OF TRADE OF THE CITY OF CHICAGO, an Illinois corporation, *Defendants.*	No. 76 C 21 (Related to Case No. 75 C 4189 before Judge Grady)

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

AFFIDAVIT

Robert P. Howington, Jr., being duly sworn on oath, deposes and says:

1. I am one of the attorneys for Abdallah W. Tamari, Ludwig W. Tamari and Farah W. Tamari, plaintiffs in this cause. I have personal knowledge of the matters hereinafter referred to and make this affidavit in support of plaintiffs, motion to stay the arbritration proceedings involving the plaintiffs and the defendant Bache & Co. Incorporated now pending before the Arbitration Committee of the defendant Board of Trade of the City of Chicago.

2. There is currently scheduled, a meeting of the aforesaid Arbitration Committee for Monday, January 26, 1976 at 2:00 p.m. for the purpose of proceeding in the aforesaid arbitration proceeding.

3. On December 10, 1975, the plaintiffs in this cause, filed a complaint with this court captioned *Abdallah W. Tamari, Ludwig W. Tamari and Farah W. Tamari, co-partners doing business as Wahbe Tamari & Sons Co.* v. *Bache & Co. (Lebanon) S. A. L. and Bache & Co. Incorporated,* Cause No. 75 C 4189, which cause has been assigned to the Honorable John F. Grady. In substance that cause seeks damages arising out of defendants' (in that cause) handling of plaintiffs' commodity futures accounts in violation of the Commodity Exchange Act and other similar grounds. A copy of the complaint filed in that cause is attached to the complaint filed in this cause as Exhibit A.

4. In the late spring of 1975, during the pendency of the aforesaid arbitration proceeding before the Arbitration Committee of the defendant Chicago Board of Trade, the defendant Chicago Board of Trade questioned whether, due to amendments to the Commodity Exchange Act, which became effective April 21, 1975, the Arbitration Committee of the defendant Chicago Board of Trade had jurisdiction to entertain the arbitration of the dispute between the defendant Bache & Co. Incorporated and the plaintiffs and then continued the matter generally.

5. In July of 1975, the staff of the Commodity Futures Trading Commission issued an interpretative opinion to the effect that arbitration proceedings pending before the effective date (April 21, 1975) of the amendment to the Commodity Exchange Act were not abated by said Act. A copy of said opinion is attached to this affidavit as Exhibit 1.

6. Subsequent to the late spring of 1975, and the general continuance of the matter based on the question of the defendant Chicago Board of Trade's jurisdiction over the matter as

referred to in paragraph 4 above, during the summer and early fall of 1975, affiant, from time to time, communicated with the house counsel of the Chicago Board of Trade as to the status of the matter. The house counsel's response was that no decision on proceeding had yet been reached.

7. However, on October 16, 1975, a meeting was held by the Arbitration Committee of the defendant Chicago Board of Trade. At a meeting, among other things, the question was raised as to whether or not the Arbitration Committee could proceed with the arbitration in the Tamari-Bache matter in light of the aforesaid opinion of the staff of the Commodity Futures Commission. At that time the applicability of such opinion was rejected by the aforesaid Arbitration Committee as to the Tamari-Bache arbitration proceeding, the Arbitration Committee stating that it would proceed only if the parties would execute waivers waiving any objections to the Committee's jurisdiction to proceed in the matter. The Committee, through its counsel, further stated that there would be drafted for the parties a form of waiver to be executed by the parties. The Committee at that meeting also rejected the applicability of such interpretive bulletin to the Norman Kern & Company—Wood and Rhone arbitration matters also pending before the Committee.

The Committee, however, did tentatively set the date of December 11, 1975 to proceed with the Tamari-Bache matter provided the parties executed the waivers waiving any objections to the Committee's jurisdiction.

8. On or about October 29, 1975, the office of the affiant received a letter dated October 27, 1975 from the aforesaid house counsel of the defendant Chicago Board of Trade. A copy of that letter is attached hereto as Exhibit 2. Said letter provides as follows:

> "Enclosed is a form which the Arbitration Committee *requires* your client to sign before it will begin hearings on this matter. If the notarization is taken anywhere other than

in the State of Illinois, the Committee would require a certificate of notarial acknowledgement indicating the authority of the notary to so notarize the document." (Emphasis supplied by affiant)

The plaintiffs never executed the form of waiver referred to in the aforesaid letter and refused to execute such waiver.

The affiant was not authorized to execute the waiver form referred to in the aforesaid letter dated October 27, 1975 and never executed such waiver. Further affiant was never authorized to waive the execution of such form and never waived the execution of such waiver.

9. On October 30, 1975, one or two days after affiant received the form of waiver referred to above, the aforesaid Arbitration Committee of the defendant Chicago Board of Trade again met. Again, among other things, the question was raised as to whether or not the Arbitration Committee could proceed with the Tamari-Bache arbitration matter in light of the aforesaid interpretive opinion of the Commodity Futures Trading Commission. Again the applicability of such opinion was rejected both as to the Tamari-Bache matter and the arbitration matter involving Norman Kern & Company. Again, it was stated that the aforesaid form of waiver was required to be executed by the parties before the Arbitration Committee would proceed in the Tamari-Bache matter and that, if such waivers were executed, hearings would begin on the aforesaid date of December 11, 1975.

10. In a letter dated and hand carried to the defendant Chicago Board of Trade on or about December 9, 1975, the Arbitration Committee of such defendant was advised of the plaintiffs' refusal to execute the required waiver and of their intention to seek relief in a court proceeding. A copy of said letter is attached to this affidavit as Exhibit 3.

11. At or about 1:00 p.m. on December 11, 1975, the office of the affiant received a letter by messenger from the house counsel for the defendant Chicago Board of Trade stating,

among other things, that the Arbitration Committee would convene that day with respect to the Tamari-Bache matter. Such house counsel also serves in an advisory capacity to the Arbitration Committee of the defendant Chicago Board of Trade. A copy of such letter is attached hereto as Exhibit 4. The letter was received approximately two hours before the time set for the convening of the Committee, as referred to in the letter.

12. On December 11, 1975, at approximately 3:00 p.m., which followed the filing of plaintiffs' related complaint in this court on December 10, 1975, as, described in paragraph 3 above, the Arbitration Committee of the defendant Chicago Board of Trade met and at that meeting for the first time advised the affiant plaintiffs' counsel that the execution of the required waiver was no longer required; further that said Committee of the defendant Chicago Board of Trade had decided to proceed with the hearing of the arbitration matter and did so in that same meeting.

13. The Arbitration Committee, in proceeding with the matter, apparently relied on the interpretive opinion of the staff of the Commodity Futures Trading Commission referred to in paragraph ..... hereof, the applicability of which to said matter, they had previously rejected. The affiant objected to the Committee's proceeding with the hearing but over affiant's objection the Committee did proceed and took evidence.

14. The Arbitration Committee of the defendant Chicago Board of Trade had never met to hear any evidence concerning the substance of the claims involved in the aforesaid arbitration proceeding at any time prior to December 11, 1975.

15. The aforesaid letter of December 11, 1975 to affiant from defendant Chicago Board of Trade's house counsel (Exhibit 4 hereof) refers to, among other things, a letter of said house counsel dated December 5, 1975 concerning another arbitration matter (*Norman Kern & Company and Rhone*) in which the affiant is counsel for one of the parties. The aforesaid house counsel stated in his letter of December 11,

1975, in referring to his letter dated December 5, 1975: "In that letter I enclosed a copy of CFTC interpretive letter No. 75-1 which indicates that matters submitted to the arbitration prior to April 21, 1975 may be heard without regard to the Section 5a(11) restriction of the Act. Therefore, as you will note, since the jurisdictional issues in the Bache-Tamari case, the reasons for your clients to execute the waiver has been obviated."

16. A copy of the aforesaid house counsel's letter dated Friday, December 5, 1975, concerning the Kern-Wood and Rhone matter is attached hereto as Exhibit 5. Such letter was received by the affiant's office on Wednesday, December 10, 1975 in an envelope postmarked Monday, December 8, 1975. Among other things, the subject letter stated as follows

> "Enclosed is a copy of CFTC interpretive letter No. 71-1 [Exhibit 1 attached to this affidavit]. In light of the interpretive letter from the Office of the General Counsel, we are going to go forward with the arbitration proceedings in the above entitled matter [*Norman Kern & Company* v. *Wood and Rhone*].

17. At no time prior to December 10, 1975 was affiant apprised by anyone associated with the defendant Chicago Board of Trade or with the Arbitration Committee of the defendant Chicago Board of Trade or by anyone that the defendant Chicago Board of Trade or the Arbitration Committee of the defendant Chicago Board of Trade had decided to proceed with the arbitration proceeding entitled *Norman Kern & Company* v. *Wood and Rhone,* and prior to December 11, 1975, affiant had not been apprised by anyone that the defendant Chicago Board of Trade or the Arbitration Committee had decided to proceed with the arbitration proceeding in which the plaintiffs and the defendant Bache & Co. Incorporated were involved.

18. At no time has affiant been informed by anyone associated with the defendant Chicago Board of Trade or with the Arbitration Committee of the Chicago Board of Trade or by

any other person, who the person or entity was that requested the opinion of the staff of the CFTC which is the subject of interpretive bulletin No. 75-1, attached hereto as Exhibit 1. Further, the affiant was not apprised that such an opinion was being sought at the time it was sought and further affiant was not informed of the issuance of such opinion at the time it was issued to the person or entity seeking it.

19. There is currently pending before the Honorable Judge Frank McGarr of this court the consolidated cases of *Norman Kern & Co.* v. *A. J. Wood and David W. Rhone* and *Norman Kern & Co.* v. *David W. Rhone,* Cause Nos. 74 C-72 and 74 C-73, which involve an arbitration proceeding before the same Chicago Board of Trade Arbitration Committee. As noted in the aforesaid defendant Chicago Board of Trade's house counsel's letter of December 11, 1975 (Exhibit 4 hereof), said house counsel contends that the jurisdictional issues as to whether or not the Arbitration Committee has jurisdiction over the *Kern* and *Wood-Rhone* matters are identical to the Tamari-Bache arbitration matter.

20. Attached hereto as Exhibit 6 is a docket sheet from affiant's office respecting future dates concerning the consolidated *Kern* and *Wood-Rhone* cases pending before the Honorable Frank McGarr. Affiant has been informed that with respect to the status reports before Judge McGarr on November 5, 1975, and December 8, 1975, the attorneys representing the respective parties in those consolidated cases both reported to Judge McGarr that as of those respective dates the Arbitration Committee of the defendant Chicago Board of Trade had not yet agreed to entertain jurisdiction of those matters; that at the status report on December 8, 1975, Judge McGarr set January 13, 1976 as the date for a further status report and for setting a pretrial conference in the event that the defendant Chicago Board of Trade had not by then accepted those cases for arbitration; that it was not until the status report on January 13, 1976 that the attorney for Wood and Rhone reported to Judge

McGarr that the defendant Chicago Board of Trade had decided to entertain jurisdiction over the *Kern* and *Wood-Rhone* matters; and that said attorney objected to the defendant Chicago Board of Trade's jurisdiction (see affidavit of Donald C. Shine attached to the Motion).

21. It was not until December 10, 1975, when affiant read the letter dated December 5, 1975 from the aforesaid house counsel which letter arrived in an envelope postmarked December 8, 1975, that affiant was aware that the aforesaid Arbitration Committee of the defendant Chicago Board of Trade had decided "in light of the interpretation from the Office of the General Counsel [to go] forward with the arbitration proceedings" in the *Kern* and *Wood-Rhone* matters.

22. The letter dated December 11, 1975, from the aforesaid house counsel (Exhibit 4 hereto) does not state or mention that the affiant, prior to the receipt by the affiant of the aforesaid house counsel's letter dated December 5, 1975 (Exhibit 5 hereto), had any notice or knowledge that the Arbitration Committee of the defendant Chicago Board of Trade would proceed, in light of the aforesaid interpretive letter of the Commodity Futures Trading Commission (Exhibit 1 hereof), in either the aforesaid *Kern* and *Wood-Rhone* matters or the Tamari-Bache matter or that the Committee no longer required the parties to execute the aforesaid required waivers waiving any objections to the Committee's jurisdiction over the matter before it would proceed in the Tamari-Bache matter. As stated previously, the house counsel's letter dated December 5, 1975 was not received by affiant until December 10, 1975.

23. During the arbitration proceedings before the defendant Chicago Board of Trade Arbitration Committee, the plaintiffs, beginning with the hearing of December 11, 1975, have been accused of delaying the proceedings. Despite such accusations the proceedings on December 11, 1975, January 7, 1976 and January 14, 1976, over the objections of the plaintiffs, have proceeded. It is true that prior to December 11, 1975 that

the affiant and the plaintiffs were of the opinion that the arbitration proceedings would terminate once the defendant Chicago Board of Trade was informed of the plaintiffs' refusal to execute the required waiver as mentioned above. It is also true that on January 7, 1976 the plaintiff came before this court requesting a stay of the arbitration proceedings. The proceedings at that time were not stayed by the court, and the defendant Chicago Board of Trade's Arbitration Committee has continued to proceed with the matter, setting Monday, January 26, 1976 as the next proceeding date. Affiant submits that the cause of the delay in the arbitration matter was the defendant CBOT's indecision regarding the new amendments to the Commodity Exchange Act and the applicability of the aforesaid interpretive opinion of the Commodity Futures Trading Commission.

24. On or about Wednesday, January 21, 1976 a motion was made by the defendant Bache & Co., Incorporated to stay the related case, Cause No. 75 C 4189, and this cause pending the disposition of the Tamari Bache arbitration now pending before the defendant Chicago Board of Trade's Arbitration Committee. In that same motion the defendant Bache & Co. Incorporated moved that the plaintiffs be compelled to arbitrate before the defendant Chicago Board of Trade's Arbitration Committee. Such motion appears to assume that the aforesaid arbitration proceeding is not currently proceeding before the defendant CBOT's Arbitration Committee. As shown herein the arbitration proceeding has continued to proceed despite the plaintiffs having filed the two causes now pending before this court.

25. "Plaintiffs, through their attorney, the affiant, question the propriety of the defendant Chicago Board of Trade's Arbitration Committee continuing the proceeding in the arbitration matter when at the same time it is adversary to the plaintiffs in the instant causes now pending before the court." The defendant Chicago Board of Trade's Arbitration Committee, during the pendency of this cause, has attempted to direct and control how the plaintiffs proceed in this cause.

26. Affiant, and the plaintiffs through the affiant, relied on the defendant Chicago Board of Trade's Arbitration Committee's representation that the subject arbitration matter would not proceed until the plaintiffs had executed a waiver waiving any objection which they might have to the jurisdiction of the defendant Chicago Board of Trade's Arbitration Committee over such arbitration matter, and the plaintiffs' course of action thereafter, in some part, was the result of their reliance on the aforesaid representation of the defendant Chicago Board of Trade's Arbitration Committee. Affiant, and plaintiffs through the affiant, submit that the defendant Chicago Board of Trade and its Arbitration Committee are estopped from claiming that they still have jurisdiction over the subject arbitration matter. "Furthermore, a partisan atmosphere seems to have developed within the Committee since the time that plaintiffs first challenged the jurisdiction of the defendant Chicago Board of Trade's Arbitration Committee over the subject arbitration matter."

27. It is the opinion of affiant that the Arbitration Committee of the defendant Chicago Board of Trade lacks subject matter jurisdiction over the aforesaid arbitration proceeding now pending before it, because such proceedings are barred by the provisions of Section 5a(11) of the Commodity Exchange Act, as amended (7 U. S. C. § 7a(11)) as well as by principles of law and equity, all as more fully appears in paragraphs 34 through 37 of the complaint filed in this cause.

28. Further it is the opinion of the affiant, as more fully appears in paragraph 38 of the complaint filed in this cause, that such arbitration proceedings should not further proceed before the Arbitration Committee of the defendant Chicago Board of Trade and, further, that the subject matter of such proceeding is not a proper matter for arbitration.

29. Unless this court stays the aforesaid arbitration proceeding currently pending before the Arbitration Committee of the defendant Chicago Board of Trade, the plaintiffs will suffer

irreparable harm and damage in that such proceeding will continue to proceed without permitting this court the opportunity to determine the issues which are the subject of the complaint filed in this cause, an action for declaratory judgment, and, to an extent, render the relief sought by the plaintiffs in this cause a nullity, and, further, will encroach upon and interfere with this court's jurisdiction of this cause and the related cause described in paragraph 3 above.

30. The individual plaintiffs until recently were living in Lebanon and the principal place of business of plaintiff Wahbe Tamari & Sons Co. is Beirut, Lebanon. The three plaintiffs are now residing either in Paris, France or Amman, Jordan. Beirut, Lebanon is currently beset with civil disorder and armed conflict, a condition which caused plaintiffs, who are Christians, great hardship and business disruptions. On December 30, 1975, in response to a request for affiant for documents related to the aforesaid arbitration proceeding, plaintiff Abdallah Tamari advised affiant by cablegram that plaintiffs' office has been closed due to the civil war in Lebanon and that consequently plaintiffs are unable to furnish the requested documentation. On several occasions since, the affiant has been informed that the documents are not under their possession and control. In the opinion of the affiant, to require plaintiffs to participate in evidentiary hearings or other proceedings before the Arbitration Committee of the defendant Chicago Board of Trade under the above-described circumstances is contrary to the principles of law and equity.

Dated this 22nd day of January, 1976.

ROBERT P. HOWINGTON, JR.

Subscribed and sworn to before me this 22nd day of January, 1976.

_____

Notary Public

EXHIBIT G

[¶ 20,088] CFTC Interpretative Letter No. 75-1 [Pending Arbitration Proceedings Involving Claims Exceeding $15,000].

Commodity Futures Trading Commission, Office of the General Counsel, Trading and Markets, July 29, 1975. Correspondence in full text.

Contract Markets—Pending Arbitration Proceedings—Claims Exceeding $15,000—Effect of CFTC Act.—Arbitration proceedings pending before contract markets as of the effective date of the Commodity Futures Trading Commission Act of 1974 involving customer claims in excess of $15,000 are not abated by the addition of Sec. 5a(11) to the Commodity Exchange Act (Sec. 209 of the CFTC Act). Since such arbitration proceedings appear to be "proceedings under existing law," Sec. 412 of the CFTC Act prevents such proceedings from being abated.

See ¶ 5845, "Commodity Futures Trading Commission" division and ¶ 6505, "Contract Markets" division.

[CFTC *Staff Reply*]

This is in response to your request for an interpretation from this Office as to whether arbitration proceedings pending before contract markets as of the effective date of the CFTCA—which was April 21, 1975—are abated by Section 209 of that Act if they involve customer claims in excess of $15,000. In the opinion of this office, they are not.

Section 209 requires contract markets to provide a procedure for the settlement of customers' claims, provided, *inter alia*, that "the procedure shall not be applicable to any claim in excess of $15,000. . . ." As you indicate in your letter, however, Section 412 of the CFTCA provides that "Pending proceedings under existing law shall not be abated by reason of any provision of this Act [the CFTCA] but shall be disposed of pursuant to the applicable provisions of the Commodity Exchange Act, as

amended, in effect prior to the effective date of this Act." Since arbitration proceedings before contract markets appear to be "proceedings under existing law" and since the Commodity Exchange Act, prior to the enactment of the CFTCA, was silent on the subject of arbitration, Section 412 would prevent the proceedings that are the subject of your inquiry from being abated by Section 209. In addition, since your inquiry related to the arbitration of customer claims in excess of $15,000, I am enclosing an interpretative release issued by the Commission that deals with this matter. You will note that the interpretation states that Section 209 does not prohibit a contract market from establishing arbitration or other procedures for the resolution of customers' claims involving amounts in excess of $15,000. Thus, even after the effective date of the CFTCA, a contract market would be permitted to arbitrate customer claims as long as the arbitration or other proceedings are separate procedures which are independent of and do not interfere with or delay the resolution of customer claims which are submitted under Section 209.

[*Letter of Inquiry*]

A question has arisen as to the bearing, if any, of Section 209 of the Commodity Futures Trading Commission Act of 1974 as to arbitrations pending (and as yet incomplete) before arbitration boards of contract markets as of the effective date of this Act involving customers' claims in excess of $15,000.00.

It appears to us that Section 412 of the 1974 Act would indicate that Section 209 would have no bearing whatever upon such proceedings.

We would appreciate receiving the opinion of your general counsel covering this subject matter.

EXHIBIT H

THE CHICAGO BOARD OF TRADE

October 27, 1975

Robert P. Howington, Jr., Esq.
Howington, Elworth & Osswald
135 South LaSalle Street - Suite 3910
Chicago, Illinois 60604

Re: *Bache* v. *Tamari*

Dear Mr. Howington:

Enclosed is a form which the Arbitration Committee requires your client to sign before it will begin hearings on this matter. If the notarization is taken anywhere other than in the State of Illinois, the Committee would require a certificate of notarial acknowledgement indicating the authority of the notary to so notarize the document.

Very truly yours,

/s/ ROBERT A. VANASCO
Robert A. Vanasco

EXHIBIT I

Ludwig W. Tamari, Abdallah W. Tamari, Farah Tamari, individually and as co-partners doing business as Wahbe Tamari & Sons, and Wahbe Tamari & Sons Company, having voluntarily submitted to the jurisdiction of the Arbitration Committee of the Board of Trade of the City of Chicago for the purposes of having the following claim and counterclaim finally determined by the Committee:

> Claim of Bache & Company, Incorporated for the sum of $376,666.96;
>
> Counterclaim of Ludwig W. Tamari, Abdallah W. Tamari, Farah Tamari, individually and as co-partners doing business as Wahbe Tamari & Sons, and Wahbe Tamari & Sons Company for the sum of $2,150,000.00,

do hereby forever waive the right to challenge the jurisdiction of said Arbitration Committee in regard to such controversy at any time, either during the proceedings or after the issuance of an award.

Signature of LUDWIG W. TAMARI
Signature of ABDALLAH W. TAMARI
Signature of FARAH W. TAMARI

Date

Notarization

EXHIBIT J

Law Offices
Howington, Elworth & Osswald
135 South LaSalle Street - Suite 3910
Chicago, Illinois 60603

December 9, 1975

Robert Vanasco, Esq.
Counsel
Board of Trade of the
City of Chicago
Fifth Floor
141 West Jackson Boulevard
Chicago, Illinois 60604

Re: *Bache - Tamari Matter*

Dear Mr. Vanasco:

I have been informed by the Tamaris that they have decided not to execute the waiver which the Association has required as a condition for its proceeding in the above entitled matter. The reasons for their decision, among other things, are the ambivalence of the Association toward the matter, the uncertainties of the Association's procedures and the doubtful validity of any award which might be rendered. The latter concern, of course, is the result of the position which the Association has taken in the past.

There is also the concern that the posture of the matter has precluded the Association from undertaking its own independent investigation of the Tamaris' complaints against Bache. In view, however, of the resolution of the matter, such an investigation may now proceed.

In any event, I have been instructed by the Tamaris to terminate the proceedings before the Association, which is the purpose of this letter, and, instead, undertake to pursue their remedies in court, which I am doing forthwith.

Please express my appreciation to the Committee. Also please advise Mr. Giambalvo immediately of this action in order that he may abate his efforts with respect to the meeting which had been scheduled for Thursday afternoon.

Yours very truly,

ROBERT P. HOWINGTON, JR.

RPH:mmb
By Messenger

EXHIBIT K

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

ABDALLAH W. TAMARI, LUDWIG W. TAMARI and FARAH W. TAMARI, co-partners doing business as WAHBE TAMARI & SONS CO.,
Plaintiffs,

vs.

BACHE & CO. (LEBANON) S. A. L., a Lebanese corporation, and BACHE & CO. INCORPORATED, a Delaware corporation,
Defendants.

75 C 4189
(Plaintiffs demand a trial by jury).

COMPLAINT

Abdallah W. Tamari, Ludwig W. Tamari and Farah W. Tamari, doing business as Wahbe Tamari & Sons Co., plaintiffs, by their attorneys, complain of defendant Bache & Co. (Lebanon) S. A. L. and defendant Bache & Co. Incorporated, and allege as follows:

Count I

1. This action arises under the Commodity Exchange Act, 7 U. S. C. § 1 *et seq.*, as hereinafter more fully appears. The amount in controversy exceeds the amount of ten thousand dollars ($10,000.00) exclusive of interest and costs. Jurisdiction is conferred on this court by 28 U. S. C. § 1331(a), 28 U. S. C. § 1337 and 28 U. S. C. § 1350.

2. Plaintiffs Abdallah W. Tamari, Ludwig W. Tamari and Farah W. Tamari are citizens of Lebanon, which is their resi-

dence, and where, among other things, they do business under the style of Wahbe Tamari & Sons Co.

3. Defendant Bache & Co. (Lebanon) S. A. L. (hereinafter referred to as "Bache Lebanon") is a corporation organized under the laws of Lebanon, and it has its principal place of business in Beirut, Lebanon.

4. Defendant Bache & Co. Incorporated (hereinafter referred to as "Bache Delaware") is a corporation organized under the laws of Delaware, and it does, and has a place of, business in Chicago, Illinois.

5. At all times pertinent to the allegations of this complaint, the defendant Bache Lebanon and the defendant Bache Delaware did, and still do, transact business, insofar as this complaint is concerned, as follows: Defendant Bache Lebanon, which is and was engaged in the securities and commodities futures business, acting through its employees and agents in Lebanon, did solicit commodity futures accounts from prospective customers in Lebanon and caused such customers to open commodity futures accounts; after such accounts were opened, the defendant Bache Lebanon did solicit and accept orders of such customers for commodity futures contracts and did transmit such orders by wire from its offices in Beirut, Lebanon to members of commodity exchanges for execution; as to those orders for commodity futures contracts that were accepted by the defendant Bache Lebanon from customers, and which were to be executed on the Board of Trade of the City of Chicago ("CBOT") and the Chicago Mercantile Exchange ("CME"), and were so executed, such orders were transmitted on a continuing basis by defendant Bache Lebanon from its office in Beirut, Lebanon to the office of the defendant Bache Delaware, which is and was engaged in the securities and commodities futures business, in Chicago, Illinois for execution. Such orders were then caused to be executed by the defendant Bache Delaware on the applicable commodity exchange in Chicago, Illinois.

6. Beginning in early 1972, defendant Bache Lebanon, acting through its employees and agents, on many occasions, solicited the plaintiffs to open a commodity futures account for the purpose of trading in commodity futures contracts on various commodity exchanges including the CBOT and CME. During the course of such solicitation, the defendant Bache Lebanon represented to the plaintiffs that the defendant Bache Lebanon and the defendant Bache Delaware were expert in the handling of commodity futures trading, in analyzing commodity markets and in forecasting trends in such markets. Relying on such representations of the defendant Bache Lebanon, the plaintiffs, on or about May 20, 1972, did open one commodity futures account, #MF 1564, in which the plaintiffs owned the entire interest and, subsequently, on or about September 22, 1972, the plaintiffs, together with one George Khnouf, did open a second commodity futures accounts, #MF 1602, in which the plaintiffs owned a half interest and said George Khnouf owned the other half interest. The fact that George Khnouf owned a half interest in account #MF 1602 was known to the defendant Bache Lebanon and the defendant Bache Delaware.

7. With respect to the aforesaid commodity futures account #MF 1564, beginning on or about May 20, 1972 and ending in the summer of 1973, and with respect to the aforesaid commodity futures account #MF 1602, beginning on or about September 22, 1972 and ending in the summer of 1973, defendant Bache Lebanon, acting through its employees and agents, did solicit the plaintiffs in Lebanon for orders for commodity futures contracts and accepted orders from them for commodity futures contracts. Such orders were for commodity futures contracts trade on various commodity exchanges including the CBOT and the CME. As to those orders for commodity futures contracts for such accounts that were to be executed on exchanges other than the CBOT and the CME, and were so executed, such orders were transmitted by wire by the defendant Bache Lebanon from its office in Beirut, Lebanon to members of exchanges

where such orders were to be executed. As to those orders for commodity futures contracts for the aforesaid accounts that were to be executed on the CBOT and the CME, and were so executed, such orders were transmitted by wire on a continuing basis by the defendant Bache Lebanon from its office in Beirut, Lebanon to the office of the defendant Bache Delaware in Chicago, Illinois for execution. Such orders for the aforesaid accounts were then caused to be executed by the defendant Bache Delaware on the applicable exchange in Chicago, Illinois. The losses in such accounts, as hereinafter referred to, from trading in such commodity futures contracts, which were executed on the CBOT and CME in Chicago, Illinois, did not occur until after the initial positions established by the execution of such orders for such commodity futures contract on the applicable exchange were offset by the execution of orders for opposing transactions in the same commodity futures contract on the same exchange.

8. With respect to the representations made by the defendant Bache Lebanon, that the defendant Bache Lebanon and the defendant Bache Delaware were expert in the handling of commodity futures trading, in analyzing commodity markets and in forecasting the trends in such markets caused the plaintiffs to repose complete confidence in the defendants as to their expertise in such matters. Such representations were continuing and were made by the defendant Bache Lebanon up to the time the aforesaid commodity futures accounts were closed.

9. With respect to the continuous representations made by the defendant Bache Lebanon that it was expert in the handling of commodity futures trading, in analyzing commodity markets and in forecasting trends in such markets, such representations were false and, at the time such representations were made, Bache Lebanon either knew that such representations were false or made such representations with a reckless disregard of their truth or falsity.

10. During the period of the trading of the aforesaid accounts, the defendant Bache Lebanon telephoned or visited the plaintiffs or their employees or agents many times a day, advising and recommending that the aforesaid accounts trade in various commodity futures contracts. The plaintiffs and their employees and agents relied on the advice and recommendations of the defendant Bache Lebanon, and the defendant Bache Lebanon caused such accounts to trade in the commodity futures contracts recommended by it with the knowledge that the plaintiffs and their employees and agents were inexperienced in the trading of commodity futures contracts, particularly commodity futures contracts which were traded on the CBOT and CME.

11. During the period of the trading of the aforesaid accounts, the defendant Bache Lebanon caused and permitted, and the defendant Bache Delaware permitted, such accounts to be traded when the accounts were in a severely undermargined and deficit condition.

12. During the period of the trading of the aforesaid accounts, the defendant Bache Lebanon caused and permitted, and the defendant Bache Delaware permitted, trading in numbers of commodity futures contracts in excess of written restrictions imposed by the plaintiffs on the number of contracts which would be traded in such accounts, which restrictions the defendants had knowledge of.

13. During the period of trading of the aforesaid accounts, the defendant Bache Lebanon assigned employees to act as the commodity account executives for such accounts and represented to the plaintiffs and their employees and agents that such persons were expert and experienced in handling commodity futures accounts. With respect to the representations made by the defendant Bache Lebanon that such persons were expert and experienced in handling commodity futures accounts, such representations were false, and, at the time such representations were made, Bache Lebanon either knew that such representations were false or made such representations with a reckless

disregard of their truth or falsity and, further, the defendant Bache Lebanon failed to use due care, and was negligent, in the supervision of the commodity account executives handling such accounts.

14. During the period of the trading of the aforesaid accounts, the defendant Bache Lebanon recommended, and continued to recommend, to the plaintiffs purported advantages in giving authority to trade such accounts to individuals in addition to the plaintiffs, and the plaintiffs, relying upon the advice and recommendations of the defendant Bache Lebanon, gave authority to other persons to trade such accounts, all of which was arranged by the defendant Bache Lebanon, when it was known to it that such persons were inexperienced in commodity futures trading.

15. During the period of the trading of the aforesaid accounts, the defendant Bache Lebanon requested and caused the plaintiffs to execute "hedging letters", thereby permitting the accounts to trade in commodity futures contracts on lower margins and, thus, in greater volume despite the fact that the defendant Bache Lebanon at the time such letters were executed knew that the trading in such accounts was not for hedging purposes and that the plaintiffs did not understand the import of such letters.

16. During the period of the trading of the aforesaid accounts, the defendant Bache Lebanon assigned three account executives to the accounts, thereby facilitating an increase in the volume of trading in such accounts.

17. During the period of the trading of the aforesaid accounts, the plaintiffs relied on the advice and recommendations of the defendant Bache Lebanon as to the commodity futures contracts which were to be and were traded in such accounts, and during such period the defendant Bach Lebanon caused and permitted, and the defendant Bache Delaware permitted, such accounts to trade in approximately 2,800 commodity futures contracts, which trading generated commissions of approxi-

mately $118,000.00 for the defendant Bache Lebanon and the defendant Bache Delaware.

18. During all times pertinent to this complaint, because of the broker-customer relationship which existed between the defendant Bache Lebanon and the plaintffs, the defendant Bache Lebanon owed a fiduciary duty to the plaintiffs.

19. During the period of the trading of the aforesaid accounts, the defendant Bache Lebanon, notwithstanding its fiduciary duty to the plaintiffs, engaged in the following acts and omissions which breached such fiduciary duty to the plaintiffs and also facilitated the churning of such accounts:

a. Failed to keep the plaintiffs properly advised as to the true condition and state of such accounts;

b. Failed to apprise the plaintiffs of the attendant risks which were inherent in trading commodity futures contracts;

c. Encouraged, advised, recommended to and caused the plaintiffs to take short positions in commodity futures contracts, and continue such positions, in a "bull market";

d. Encouraged, advised, recommended to and caused the plaintiffs to add to and "double up" their short positions in commodity futures contracts as losses mounted resulting from such short positions.

e. Failed to advise the plaintiffs of the existence of "daily trading limits" on the various exchanges where orders for commodity futures contracts were placed and to explain the potential risks created by such "daily trading limits" in a commodity future which had "locked up."

f. Made representations to the plaintiffs concerning the state and condition of the commodity markets, in which such accounts were trading which representation the plaintiffs relied on, and which representations were

false, and at the time such representations were made, the defendant Bache Lebanon either knew that such representations were false or made such representations with a reckless disregard of their truth or falsity.

g. Encouraged, advised, recommended to and caused plaintiffs not to liquidate commodity futures positions in such accounts, which the plaintiffs had requested to be liquidated.

h. Continued to carry such accounts when the plaintiffs had requested that such accounts be closed out and when such accounts were in a severely undermargined and deficit condition;

i. Continued to carry such accounts during a period of civil disturbance in Lebanon when the accounts were in a severely undermargined and deficit condition, when a legally imposed curfew existed, when communication was difficult and after the plaintiffs had requested that such accounts be closed;

j. Failed to liquidate positions in such accounts when instructed to do so by the plaintiffs;

k. Was negligent in causing orders for such accounts to be executed;

l. Failed to explain to plaintiffs the use of "open orders" or "good 'til cancelled orders" and failed to employ such kinds of orders despite plaintiffs' instructions to liquidate futures positions in such accounts; and

m. Failed to explain the nature and characteristics of the commodities which were traded in such accounts.

20. During the period of trading of the aforesaid accounts, the defendant Bache Lebanon represented to the plaintiffs that on "limit days" orders for such accounts could be "married" (crossed) with orders of other customers without the necessity of going through the trading pits of the applicable commodity exchanges and offered to so cross orders for the plaintiffs. Such

representation was false and at the time such representation was made, the defendant Bache Lebanon either knew that such representation was false or made such representation with a reckless disregard of its truth or falsity; and, in fact, such crossing of orders, or offering to cross orders, was, and is, in violation of Sections 4b and 4c of the Commodity Exchange Act (7 U.S.C. §§ 6b and 6c) and Section 1.38 of the regulations, the illegality of which was unknown to the plaintiffs at the time the defendant Bache Lebanon made such representation and offer.

21. During the period of the trading of the aforesaid accounts, the defendant Bache Delaware on "limit-up days" caused and permitted orders of customers for futures contracts which were received subsequent to orders of the plaintiffs for the same future to have priority over the orders of the plaintiffs, caused the orders of other customers to be executed and failed to have the orders of the plaintiffs executed.

22. During the period in which the aforesaid accounts were traded, the defendant Bache Delaware:

a. Failed to furnish in writing directly to the plaintiffs, as of the close of the last business day of each calendar month, or as of any other regular monthly date selected, a statement which clearly showed the open contracts with the prices at which they were acquired and the ledger balance carried for each of the accounts, as required by Section 1.33 of the regulations promulgated under the Commodity Exchange Act.

b. Failed to furnish in writing directly to the plaintiffs, a monthly statement, or an accompanying supplemental statement, showing the net profit or loss on all contracts closed since the date of the previous statement and the net unrealized profit or loss in all open contracts figured to the market as required in paragraph (a)(2) of Section 1.33a of the regulations promulgated under the Commodity Exchange Act.

c. Failed to furnish directly to each co-partner plaintiff, a copy of the monthly statement required by Section 1.33 above clearly showing on such statement or on an accompanying supplemental statement the further information specified in paragraph (a)(2) of Section 1.33a, as required by paragraph (b) of Section 1.33a of the regulations promulgated under the Commodity Exchange Act,

and that such failures breached the fiduciary duty of the defendant Bache Delaware owing to the plaintiffs and facilitated the churning of the aforesaid accounts.

23. During the period of the trading of the aforesaid accounts, by accepting and carrying such accounts, over which individuals other than the plaintiffs exercised trading authority, the defendant Bache Lebanon or the defendant Bache Delaware or both violated Regulation 1990 of the rules and regulations of the CBOT and also facilitated the churning of such accounts:

a. By failing to obtain a copy of the letter referred to in subparagraph b of paragraph 2 of said regulation.

b. By failing to send directly to the plaintiffs a monthly statement showing the exact position of each account including all open trades figures to the market as required by paragraph e of paragraph 2 of such regulation.

c. By accepting, carrying and initiating trades in such accounts when the net equity in such accounts in CBOT commodities was less than $5,000.00 as prohibited by paragraph 5 of said regulation,

and similarly violated Rule 942 of the CME.

24. During the period of the trading of the aforesaid accounts, the defendant Bache Lebanon or the defendant Bache Delaware or both:

a. Violated Rule 210 of the rules and regulations of the CBOT by carrying the accounts without proper and adequate margin;

b. Violated paragraph 8 of Regulation 1822 of the rules and regulations of the CBOT by requesting and permitting the plaintiffs to execute hedging letters for such accounts and then carrying the accounts on hedging margins when it was known to the defendant Bache Lebanon or Bache Delaware or both that the trading in such accounts was not for hedging purposes;

c. Violated paragraph 12 of Regulation 1822 of the rules and regulations of the CBOT by encouraging, advising and recommending to and causing and permitting the plaintiffs to make new trades and then accepting the orders for such trades at a time when the accounts were not properly and adequately margined;

d. Violated paragraph 14 of Regulation 1822 of the rules and regulations of the CBOT by failing to close the accounts when such accounts were in a continuing deficit and undermargined condition.

e. Violated paragraph 15 of Regulation 1822 of the rules and regulations of the CBOT by causing and permitting such accounts to trade when the positions resulting from such trading were not properly margined as required by Rule 210 and Regulations 1822 and 1822-A of the CBOT,

and by such violations also facilitated the churning of such accounts.

Similarly the defendant Bache Lebanon or the defendant Bache Delaware or both violated Rule 928 of the CME.

25. During the period of trading of the aforesaid accounts, the defendant Bache Lebanon and the defendant Bache Delaware with respect to account # MF 1602 failed to indicate on their records that George Khnouf had a half interest in such account and, further, failed to request of George Khnouf any payment with respect to the losses suffered in such account although it was through George Khnouf that the plaintiff Bache

Lebanon had approached the plaintiffs and solicited such account, said George Khnouf being the same person whom the defendant Bache Lebanon had arranged to give trading authority over such account.

26. At all times pertinent to this complaint, the defendant Bache Delaware was a futures commission merchant, as defined by Section 2 of the Commodity Exchange Act, 7 U. S. C. § 2, and was registered as such with the Commodity Exchange Authority, United States Department of Agriculture.

27. During all times pertinent to this complaint, the defendant Bache Delaware had membership privileges on the CBOT and CME and, further, had clearing member privileges with the respective clearing associations of such commodity exchanges.

28. At all times pertinent to this complaint, both the CBOT and CME were designated as contract markets, as provided for under the Commodity Exchange Act, 7 U. S. C. § 1 *et seq.*

29. During the period of the trading of the aforesaid accounts, commodity futures contracts traded in such accounts were for commodities regulated under Section 2 of the Commodity Exchange Act (7 U. S. C. § 2) and other provisions of such Act.

30. During the period of the trading of the aforesaid accounts, the trading of the accounts was subject to the rules and regulations of the commodity exchanges on which the orders for commodity futures contracts were executed and the Commodity Exchange Act (7 U. S. C. § 1 *et seq.*) and the regulations promulgated thereunder.

31. During the period of the trading of the aforesaid accounts, the defendant Bache Lebanon and the defendant Bache Delaware were subject to the provision of the Commodity Exchange Act and the regulations promulgated thereunder.

32. During all times pertinent to this complaint, defendant Bache Delaware was the agent of defendant Bache Lebanon and all acts, omissions and representations of the defendant Bache

Delaware as alleged hereinabove, were done in the course and scope of such agency and as agent for the defendant Bache Lebanon, or, alternatively, defendant Bache Lebanon was the agent of defendant Bache Delaware and all acts, omissions and representations of the defendant Bache Lebanon, as alleged hereinabove, were done in the course and scope of such agency and as agent for the defendant Bache Delaware.

33. During the period extending from on or about May 20, 1972, and ending during the summer of 1973, the plaintiffs paid to the defendant Bache Lebanon or to the defendant Bache Delaware or to both at the request and demand of the defendants sums totalling $2,150,000.00, which sums purportedly were for monies to margin the aforesaid commodity accounts and to cover deficits existing in such accounts. Said sums were paid by the plaintiffs without knowledge of the material facts hereinabove alleged and the total amount of such sums was lost by the plaintiffs by reason of the acts and omissions of the defendants as hereinabove alleged. In addition, on the date that the aforesaid commodity accounts were closed, the defendants claimed, and are still claiming, that there existed in such accounts a debit balance in the amount of $376,366.46, which the plaintiffs owe to the defendants or one of them. Plaintiffs deny that said sum, or any part thereof, is owed by the plaintiffs to either of the defendants or both, and plaintiffs state that if such debit balance does appear to exist with respect to such accounts, that sum also reflects losses caused by reason of the acts and omissions of the defendants as hereinabove alleged.

34. By reason of the facts hereinabove alleged, the defendant Bache Lebanon or the defendant Bache Delaware or both excessively traded the commodity futures accounts in which the plaintiffs had an interest and churned such accounts, made and caused to be made false representations, false reports and false statements to the plaintiffs, concealed from the plaintiffs, and deceived them as to, the true condition and state of such accounts, and defrauded the plaintiffs, all in violation of Section

4b and Section 4c of the Commodity Exchange Act and the regulations promulgated under such Act; and engaged in conduct which violated applicable rules and regulations of the commodity exchanges on which the orders for commodity futures contracts for such accounts were executed, which rules and regulations were enacted pursuant to and consistent with the provisions of the Commodity Exchange Act for the protection of persons trading in commodity futures contracts on commodity exchanges, thereby damaging plaintiffs in the amount of $2,150,000.00, which sum the plaintiffs, without knowledge of all the material facts hereinabove alleged, paid to the defendant Bache Lebanon or the defendant Bache Delaware, or both and, further, damaging plaintiffs in the amount of $376,366.96 in that the defendants are now claiming that said sum is owed by the plaintiffs to the defendant Bache Lebanon or the defendant Bache Delaware or both.

Count II

35. This action arises under the common law and the law of nations. Jurisdiction is conferred on this court by 28 U. S. C. § 1350 and by principles of pendent jurisdiction.

36. Plaintiffs reallege as part of their claim, each and every allegation contained in paragraphs 2 through 33 of Count I of this complaint.

37. By reason of the facts hereinabove alleged, the defendant Bache Lebanon or the defendant Bache Delaware excessively traded the commodity futures accounts in which the plaintiffs had an interest and churned such accounts, made and caused to be made false representations, false reports and false statements to the plaintiffs, concealed from the plaintiffs, and deceived them as to, the true condition and state of such accounts and defrauded the plaintiffs, engaged in conduct inconsistent with just and equitable principles of trade by violating the applicable rules and regulations of the respective exchanges on which the trades for such accounts were executed and, further,

breached the fiduciary duty owing to the plaintiffs, thereby damaging plaintiffs in the amount of $2,150,000.00 which sum the plaintiffs, without knowledge of all the material facts hereinabove alleged, paid to the defendant Bache Lebanon or the defendant Bache Delaware, or both, and, further, damaging plaintiffs in the amount of $376,366.96 in that the defendants are now claiming that said sum is owed by the plaintiffs to the defendant Bache Lebanon or the defendant Bache Delaware, or both.

WHEREFORE, the plaintiffs, Abdallah W. Tamari, Ludwig W. Tamari and Farah W. Tamari, co-partners doing business as Wahbe Tamari and Sons, Co., pray:

a. That the court rescind any and all transactions and agreements of any kind entered into between the plaintiffs and the defendants and each of them;

b. That the plaintiffs have judgment against the defendants in the sum of $2,150,000.00 for compensatory damages and that the defendants he held jointly and severally liable on such judgment;

c. That the plaintiffs have judgment against the defendant in the sum of $2,000,000.00 for exemplary damages and that the defendants be held jointly and severally liable on such judgment;

d. That it be adjudged that the defendants, and each of them, are not entitled to recover from the plaintiffs, or any of them, the sum of $376,366.76, or any part thereof;

e, That the plaintiffs have judgment for costs, disbursements, reasonable legal fees and interest on the aforesaid sum of $2,150,000.00 heretofore paid by the plaintiffs;

f. That the defendants, and each of them, be enjoined from proceeding in this cause, or having this cause adjudicated, in any other forum; and

g. That the plaintiffs have such other, further and different relief as this court may deem just and proper.

ROBERT P. HOWINGTON, JR.
DONALD C. SHINE
Attorneys for Plaintiffs
135 South LaSalle Street
Chicago, Illinois 60603
(312) 236-7755

Of Counsel:
HOWINGTON, ELWORTH
& OSSWALD
135 South LaSalle Street
Chicago, Illinois 60603
(312) 236-7755

EXHIBIT L

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

ABDALLAH W. TAMARI, LUDWIG W. TAMARI and FARAH W. TAMARI, co-partners doing business as WAHBE TAMARI & SONS CO.,
Plaintiffs,
vs.
BACHE & CO. (LEBANON) S. A. L., a Lebanese corporation, BACHE & CO. INCORPORATED, a Delaware corporation, and the BOARD OF TRADE OF THE CITY OF CHICAGO, an Illinois corporation,
Defendants.

No. 76 C 21
(Related to Case No. 75 C 4189 before Judge Kirkland)

COMPLAINT

Abdallah W. Tamari, Ludwig W. Tamari and Farah W. Tamari, doing business as Wahbe Tamari & Sons Co., plaintiffs, by their attorneys, complain of defendant Bache & Co. (Lebanon) S. A. L., defendant Bache & Co. Incorporated, and defendant Board of Trade of the City of Chicago, an Illinois corporation, and allege as follows:

1. This action arises under the Commodity Exchange Act, as amended, 7 U. S. C. § 1 *et seq.*, as hereinafter more fully appears. The amount in controversy exceeds the amount of ten thousand dollars ($10,000.00) exclusive of interest and costs. Jurisdiction is conferred on this court by 28 U. S. C. § 1331(a), 28 U. S. C. § 1337, 28 U. S. C. § 1350 and principles of pendent jurisdiction.

2. This is an action for a declaratory judgment pursuant to Title 28, United States Code, § 2201, for the purpose of determining a question of actual controversy between the parties, as hereinafter more fully appears.

3. Plaintiffs Abdallah W. Tamari, Ludwig W. Tamari and Farah W. Tamari (Tamaris) are citizens of Lebanon, which is their residence, and where, among other things, they do business under the style of Wahbe Tamari & Sons Co.

4. Defendant Bache & Co. (Lebanon) S. A. L. (hereinafter referred to as "Bache Lebanon") is a corporation organized under the laws of Lebanon, and it has its principal place of business in Beirut, Lebanon.

5. Defendant Bache & Co. Incorporated (hereinafter referred to as "Bache Delaware") is a corporation organized under the laws of Delaware, and it does, and has a place of, business in Chicago, Illinois.

6. Defendant Board of Trade of the City of Chicago (hereinafter referred to as "CBOT") is a corporation organized under the laws of Illinois, and it has its principal place of business in Chicago, Illinois.

7. At all times pertinent to the allegations of this complaint, the defendant Bache Lebanon and the defendant Bache Delaware did, and still do, transact business, insofar as this complaint is concerned, as follows: Defendant Bache Lebanon, which is and was engaged in the securities and commodities futures business, acting through its employees and agents in Lebanon, did solicit commodity futures accounts from prospective customers in Lebanon and caused such customers to open commodity futures accounts; after such accounts were opened, the defendant Bache Lebanon did solicit and accept orders of such customers for commodity futures contracts and did transact such orders by wire from its offices in Beirut, Lebanon to members of commodity exchanges for execution; as to those orders for commodity futures contracts that were accepted by the defendant Bache Lebanon from customers, and

which were to be executed on the defendant CBOT and the Chicago Mercantile Exchange ("CME"), and were so executed, such orders were transmitted on a continuing basis by defendant Bache Lebanon from its office in Beirut, Lebanon to the office of the defendant Bache Delaware, which is and was engaged in the securities and commodities futures business, in Chicago, Illinois for execution. Such orders were then caused to be executed by the defendant Bache Delaware on the applicable commodity exchange in Chicago, Illinois.

8. Beginning in early 1972, defendant Bache Lebanon, acting through its employees and agents, on many occasions, solicited the plaintiffs to open a commodity futures account for the purpose of trading in commodity futures contracts on various commodity exchanges including the defendant CBOT and the CME. During the course of such solicitation, the defendant Bache Lebanon represented to the plaintiffs that the defendant Bache Lebanon and the defendant Bache Delaware were expert in the handling of commodity futures trading, in analyzing commodity markets and in forecasting trends in such markets. Relying on such representations of the defendant Bache Lebanon, the plaintiffs, on or about May 20, 1972, did open one commodity futures account, #MF 1564, in which the plaintiffs owned the entire interest and, subsequently, on or about September 22, 1972, the plaintiffs, together with one George Khnouf, did open a second commodity futures account, #MF 1602, in which the plaintiffs owned a half interest and said George Khnouf owned the other half interest.

9. With respect to the aforesaid commodity futures account #MF 1564, beginning on or about May 20, 1972 and ending in the summer of 1973, and with respect to the aforesaid commodity futures account #MF 1602, beginning on or about September 22, 1972 and ending in the summer of 1973, defendant Bache Lebanon, acting through its employees and agents, did solicit the plaintiffs in Lebanon for orders for commodity futures contracts and accepted orders from them for commodity futures contracts. Such orders were for commodity futures contracts traded on various commodity exchanges including the defendant CBOT and the CME.

10. During all times pertinent to this complaint, the defendant Bache Lebanon and defendant Bache Delaware, by and through their respective agents and employees, made false representations, misstatements of facts, acted and omitted to act in the manner set forth in the allegations contained in the plaintiff's complaint in the related case entitled *Abdallah W. Tamari, Ludwig W. Tamari and Farah W. Tamari, co-partners doing business as Wahbe Tamari & Sons Co.* v. *Bache & Co. (Lebanon) S. A. L., and Bache & Co. Incorporated*, No. 75 C 4189, which allegations of said complaint are incorporated herein by reference and attached hereto as Exhibit A.

11. During all times pertinent to this complaint, orders of the plaintiffs for commodity futures contracts were executed as described in paragraphs 7, 8 and 9, above, on various commodity exchanges, including but not limited to the defendant CBOT and the CME.

12. During all times pertinent to this complaint, defendant Bache Delaware was the agent of defendant Bache Lebanon and all acts, omissions and representations of the defendant Bache Delaware as alleged hereinabove, were done in the course and scope of such agency and as agent for the defendant Bache Lebanon, or, alternatively, defendant Bache Lebanon was the agent of defendant Bache Delaware and all acts, omissions and representations of the defendant Bache Lebanon, as alleged hereinabove, were done in the course and scope of such agency and as agent for the defendant Bache Delaware.

13. At all times pertinent to this complaint, the defendant Bache Delaware had membership privileges on the defendant CBOT and CME and, further, had clearing member privileges with the respective clearing associations of such commodity exchanges.

14. During the period of the trading of the aforesaid accounts, commodity futures contracts traded in such accounts

were for commodities regulated under Section 2 of the Commodity Exchange Act, as amended (7 U. S. C. § 2), and other provisions of such Act.

15. At all times pertinent to this complaint, the defendant Bache Delaware was a futures commission merchant, as defined by Section 2 of the Commodity Exchange Act, as amended, 7 U. S. C. § 2.

16. As a result of the false representations, misstatements of fact, acts and omissions of the defendant Bache Lebanon and Bache Delaware alleged in the related case as referenced in paragraph 10, above, the plaintiffs were damaged in the amount of $2,150,000.00 which sum the plaintiffs paid to the defendant Bache Lebanon or the defendant Bache Delaware, or both, prior to the time the plaintiffs had knowledge of the aforesaid false representations, misstatements of fact, acts and omissions and, further, were damaged in the amount of $376,366.96 in that the defendant Bache Lebanon and the defendant Bache Delaware are now claiming that the plaintiffs owe said sum to either of said defendants or both.

17. On or about February 4, 1974 case #11022-125, a dispute between the plaintiffs and the defendant Bache Delaware, as more fully described in paragraph 24 hereof, was docketed with the Arbitration Committee of the defendant CBOT.

18. The docketing of the matter referenced to in paragraph 17, above, acknowledged that a dispute existed between those parties.

19. The submission of the dispute referenced in paragraph 17, above, to arbitration was caused by fraud as referenced to in paragraph 10, above, coupled with the coercion and duress employed and engendered by the defendant Bache Delaware and Bache Lebanon, and plaintiffs did not voluntarily submit to the jurisdiction of the defendant CBOT.

20. On April 21, 1975, Public Law #93-463, entitled the Commodity Futures Trading Commission Act (CFTC Act)

7 U. S. C. § 1, *et seq.*, became effective and amended the existing law, Public Law #90-258, entitled the Commodity Exchange Act, as amended, 7 U. S. C. § 1, *et seq.*

21. Prior to April 21, 1975 the Commodity Exchange Act was silent on the subject of arbitration of disputes between members of commodity exchanges and their customers conducted by arbitration committees of the various commodity exchanges.

22. Since its amendment on April 21, 1975, the present Commodity Exchange Act provides for arbitration, Title 7 U. S. C. § 5a.(11); Pub. Law 93-463, Sec. 209; 88 Stat. 1401, as follows:

> "Each contract market shall—
>
> (11) Provide a fair and equitable procedure through arbitration or otherwise for the settlement of customers' claims and grievances against any member or employee thereof; Provided, that (i) the use of such procedure by a customer shall be voluntary, (ii) the procedure shall not be applicable to any claim in excess of $15,000, (iii) the procedure shall not result in any compulsory payment except as agreed upon between the parties, and (iv) the term "customer" as used in this subsection shall not include a futures commission merchant or a floor broker."

23. At all times pertinent to this complaint, both the defendant CBOT and the CME were designated as contract markets, as provided for under the Commodity Exchange Act, as amended, 7 U.S.C. § 1 *et seq.*

24. The controversy between the plaintiffs herein and defendant Bache Delaware, docket No. 11022-125, is currently pending before the Arbitration Committee of the defendant CBOT. The plaintiffs, in such proceeding have claimed and seek the recovery of $2,150,000.00 from defendant Bache Delaware from claims arising out of defendant Bache Lebanon's and defendant Bache Delaware's handling of commodity futures trading accounts No. MF 1564 and No. MF 1602 as described above in paragraphs 8 and 9. Defendant Bache Delaware in such

proceeding seeks the recovery of $376,366.96 from plaintiffs for alleged claims arising out of the aforesaid commodity futures trading accounts.

25. Defendant Bache Lebanon is not a party to the aforesaid controversy currently pending before the Arbitration Committee of the defendant CBOT, nor has defendant Bache Lebanon filed a complaint against the plaintiffs in any forum or with any exchange.

26. Plaintiffs' appearance in the controversy currently pending before the Arbitration Committee of the defendant CBOT is compelled and involuntary, in contravention of Rule 183 of the defendant CBOT and is further violative of principles of law, equity and public policy.

27. On December 10, 1975 plaintiffs filed with his Court a complaint entitled *Abdallah W. Tamari, Ludwig W. Tamari and Farah W. Tamari, co-partners doing business as Wahbe Tamari & Sons Co.*, v. *Bache & Co. (Lebanon) S.A.L., a Lebanese corporation, and Bache & Co. Incorporated, a Delaware corporation*, 75 C 4189, (the related case designated in the caption) seeking relief under the Commodity Exchange Act, as amended, 7 U.S.C. §1, *et seq.*, for claims exceeding $2,100,000.00 arising, *inter alia*, out of the handling of the above-described commodity futures trading accounts and in connection with commodity futures transactions executed on the defendant CBOT and CME by defendant Bache Delaware. A copy of said complaint is attached hereto as Exhibit A.

28. In the late spring of 1975, during the pendency of the above designated matter before the Arbitration Committee of the defendant CBOT, the defendant CBOT questioned whether, due to the amendments to the Commodity Exchange Act, which became effective on April 21, 1975, the Arbitration Committee of the defendant CBOT had jurisdiction to entertain arbitration of the dispute between the defendant Bache Delaware and the plaintiffs, and then continued the matter generally.

29. In July of 1975, the staff of the Commodity Futures Trading Commission issued an interpretative opinion to the effect that arbitration proceedings pending before the effective date (April 21, 1975) of the amendment to the Commodity Exchange Act, as amended, were not abated by said Act. A copy of said opinion is attached hereto and incorporated herein by reference as Exhibit "B".

30. Following the issuance of the above-described interpretative opinion, Exhibit B, the Arbitration Committee of the defendant CBOT considered said opinion at various times up to and including October 30, 1975, which was the last meeting concerning the above described arbitration proceeding prior to the filing of plaintiffs' related complaint described in paragraph 10 above. Notwithstanding knowledge of the contents of the interpretative opinion, Exhibit B, the Arbitration Committee of the defendant CBOT rejected its application to the aforesaid controversy pending before it and insisted and continued to insist that as a condition precedent to the Arbitration Committee's proceeding in the matter that the parties, defendant Bache Delaware and plaintiffs, execute waivers, waiving objections to the jurisdiction of said Arbitration Committee. A copy of the defendant CBOT's letter, dated October 27, 1975, requiring the execution of the above-described waiver is attached hereto and incorporated herein by reference as Exhibit "C".

31. However, in a letter dated and hand delivered to the defendant CBOT on or about December 9, 1975, the Arbitration Committee of the defendant CBOT was advised of the plaintiffs' refusal to execute the required waiver and of their intention to seek relief in a court proceeding. A copy of said letter is attached hereto and incorporated herein by reference as Exhibit "D".

32. On December 11, 1975, which followed the filing of plaintiffs' related complaint in this Court on December 10, 1975, the Arbitration Committee of the defendant CBOT met and at that meeting for the first time advised the plaintiffs that the

execution of the aforementioned waiver was no longer required and the Arbitration Committee of the defendant CBOT had decided to proceed with hearings in the matter and did so at that same meeting.

33. The Arbitration Committee of the defendant CBOT never met to hear any evidence concerning the substance of the claims in the above-designated matter at any time prior to December 11, 1975.

34. The decision of the Arbitration Committee of the defendant CBOT to assert jurisdiction and conduct hearings violates the provisions of Section 5a(11) of the Commodity Exchange Act, as amended, 7 U.S.C. § 7a(11), in the following respects:

A. Section 5a(11)(i) provides that the use of the arbitration procedure by a customer of a member of an exchange must be voluntary. On or about December 9, 1975 the plaintiffs notified the defendant CBOT of their intention to terminate the matter before the Arbitration Committee of the defendant CBOT. To require the plaintiffs to arbitrate contravenes the requirement of the Commodity Exchange Act that the use, as amended, of the arbitration procedure be voluntary.

B. Section 5a(11)(ii) provides that arbitration procedure shall not be applicable to any claim in excess of $15,000.00. The respective claims of the parties to the arbitration total more than $28,500,000.00. To require the plaintiffs to arbitrate contravenes the requirement of the Commodity Exchange Act, as amended, that the claim not exceed $15,000.00.

C. Section 5a(11)(iii) requires that the arbitration procedure not result in any compulsory payment except as agreed upon between the parties. In the instant situation, the arbitration procedure is likely to result

in compulsory payment not as agreed upon between the parties. To require the plaintiffs to arbitrate contravenes the requirement of the Commodity Exchange Act, as amended, that the arbitration procedure not result in any compulsory payment.

D. Section 5a(11) provides that the arbitration procedure followed by contract markets, and in this case by the defendant CBOT, be "fair and equitable." The abrupt decision of the Arbitration Committee of the defendant CBOT to conduct hearings in the matter is neither fair nor equitable in two respects:

(i) The decision to reverse its earlier position and no longer require the parties to execute waivers to any objection to its jurisdiction as a condition precedent to its proceeding with the matter was rendered only after the Arbitration Committee was informed of the refusal of the plaintiffs to execute such a waiver and only after the filing of a complaint by the plaintiffs in this Court.

(ii) The decision to conduct hearings was rendered at a time when plaintiffs' homeland and principal place of business, Beirut Lebanon, is disrupted by civil disturbance and armed conflict. Further, hearings have been scheduled at a time when, due to the aforementioned disturbance and conflict, plaintiffs would be disadvantaged if required to attend and assist in the preparation and presentation of their case.

35. The members of the Arbitration Committee of the defendant CBOT had before them the interpretative opinion issued by the staff of the Commodity Futures Trading Commission referred to in paragraph 30, above, and apparently the Committee based its decision thereon.

36. The opinion of the staff of the Commodity Futures Trading Commission is predicated upon Section 412 of the Commodity Futures Trading Commission (CFTC Act) 7 U.S.C. § 4a, note, which provides:

> "Pending proceedings under existing law shall not be abated by reason of any provision of this Act but shall be disposed of pursuant to the applicable provisions of the Commodity Exchange Act, as amended, in effect prior to the effective date of this Act."

37. The plaintiffs maintain that the provisions of Section 412 of the CFTC Act set forth above, do not apply to the aforesaid dispute pending before the Arbitration Committee of the defendant CBOT for the following reasons:

A. The above designated matter is not a "proceeding" within the meaning of that term as used in Section 412.

B. The above designated matter is not a "proceeding under existing law" in that provisions of the Commodity Exchange Act, as amended, which were in effect and preceding the amendment of the Act, as aforesaid, did not authorize or sanction the arbitration by the CBOT or any contract market of claims by or against members of the CBOT, or any contract market; nor is the matter being disposed of pursuant to applicable provisions of the Commodity Exchange Act in effect prior to the effective date of its amendment.

C. The pendency of the matter before the Arbitration Committee of the defendant CBOT was compelled in contravention of the provisions of Rule 183 of the defendant CBOT.

D. Any participation by the plaintiffs in the matter pending before the Arbitration Committee, the defendant CBOT was coerced by the defendant Bache Delaware and Bache Lebanon in violation of law, equity and public policy.

38. In addition to the invocation of the proscription of Section 5a(11) of the Commodity Exchange Act, as amended, 7 U. S. C. § 7a(11) of the termination of the arbitration proceedings is further warranted because a full, complete, fair and impartial determination of the respective claims of plaintiffs and defendant Bache Delaware cannot be rendered by the Arbitration Committee of the CBOT owing to the presence of the following factors:

A. Not all parties to the respective claims of the parties are parties to the defendant CBOT Arbitration Committee proceedings. Defendant Bache Lebanon is not a party to those proceedings. The presence and participation of defendant Bache Lebanon is essential to the question of liability and an adjudication of the respective claims. Any determination rendered by the Arbitration Committee of the CBOT in the absence of defendant Bache Lebanon would be incomplete and piecemeal.

B. Prior to the hearing of the Arbitration Committee of the defendant CBOT on December 11, 1975 the plaintiffs filed with the Business Conduct Committee of the defendant CBOT a complaint against defendants Bache Lebanon and Bache Delaware alleging losses in excess of $2,500,000.00 as a result of acts of those defendants which are violative of Sections 4b and 4c of the Commodity Exchange Act, as amended (7 U. S. C. §§ 6b and 6c), Sections 1.33, 1.33a and 1.38 of the regulations promulgated pursuant to the Commodity Exchange Act, as amended, as well as violations of CBOT rules and regulations 210, 1822-A and 1990. Under the provisions of Section 5a(8) of the Commodity Exchange Act, as amended, 7 U. S. C. § 7a(8), and CBOT Rule 84(d) the Business Con-

duct Committee of the CBOT should undertake the investigation of the plaintiffs' claims against the defendants Bache Lebanon and Bache Delaware. The respective purposes and functions of arbitrator and investigator create conflicts of interest, are mutually exclusive and ought not vest within the same body.

C. On September 17, 1974 plaintiffs filed their claims with the Arbitration Committee of the CBOT which set forth charges of serious violations of federal law and rules of the defendant CBOT by the defendant Bache Delaware and defendant Bache Lebanon. To plaintiffs' knowledge such charges have not been referred for investigation by the Office of Investigation and Audits pursuant to the provisions of Regulations 1785 and 1786 of the defendant CBOT. The consequence that a decision could be rendered by the Arbitration Committee of the defendant CBOT prior to the undertaking and completion of an investigation by the defendant CBOT deprives the plaintiffs of adequate protections and assistance.

D. There is questionable propriety of entrusting the decision of the issues involving violations of federal regulatory law to arbitrators who are subject to such federal regulatory law and who are drawn from the business forum which is subject to such federal regulatory law and in which one of the parties to the arbitration is a substantial participant and member as well as subject to such federal regulatory law.

E. The volume and complexity of the charges and countercharges raised in the arbitration matter together with the attendant legal issues exceed the scope of matters customarily entertained by the Arbitration Committee of the defendant CBOT with the result that the decision in the instant matter may not be adequately supported.

39. The plaintiffs will suffer irreparable harm if the defendants CBOT and Bache Delaware are allowed to conduct and participate, respectively, in further arbitration proceedings, or if any of the defendants are allowed to initiate or participate in any forum or before any exchange prior to a resolution by this Court of the issues raised in this complaint.

WHEREFORE, the plaintiffs, Abdallah W. Tamari, Ludwig W. Tamari and Farah W. Tamari, co-partners doing business as Wahbe Tamari and Sons, Co., pray:

A. That this court entertain this action;

B. That this Court enter a judgment declaring that the provisions of Section 209 of the Commodity Exchange Act, 7 U. S. C. § 15a(11) apply and operate to bar arbitration proceedings conducted by the Arbitration Committee of the defendant Board of Trade of the City of Chicago in the matter designated *Bache & Co. Incorporated* v. *Abdallah W. Tamari, Ludwig W. Tamari and Farah W. Tamari, co-partners doing business as Wahbe Tamari & Sons, and Wahbe Tamari & Sons Co.*, No. 11022-125, and that Section 412 of that same Act, 7 U. S. C. § 4a, note, does not apply to the instant cause and does not apply to arbitration proceedings pending before arbitration committees of contract markets as of the effective date of the Commodity Exchange Act, as amended.

C. That this Court enter a judgment declaring that the termination of the arbitration proceedings is warranted because a full, complete, fair and impartial determination of the respective claims of the parties thereto cannot be rendered due to the following: That the participation of the plaintiffs in the pending dispute before the Arbitration Committee of the defendant CBOT was obtained by the fraud, coercion and duress caused by the defendant Bache Delaware and the defendant Bache Lebanon in violation of law,

equity and public policy and is in contravention of Rule 183 of the defendant CBOT; that the participation of the plaintiffs in the aforesaid arbitration proceedings is not voluntary; that not all parties to the respective claims of the parties are parties to the aforesaid arbitration proceedings; that the presence and participation of all parties to the dispute, including defendant Bache Lebanon is necessary to the question of liability and a just adjudication of the respective claims; that any adjudication of the merits of the respective claims in the absence of Bache Lebanon would be incomplete, piecemeal and not in the interests of justice; that prior to the hearing of any evidence by the Arbitration Committee of the defendant CBOT or the furnishing of notice that the aforesaid Committee had determined to proceed to hear evidence in the dispute without securing the execution of waivers required by it, the plaintiffs served notice of their refusal to execute a waiver to any objection to the jurisdiction of the Arbitration Committee and further filed a complaint in this Court; that plaintiffs have filed complaints with the defendant CBOT, which call for the investigation of the defendant Bache Delaware and Bache Lebanon and such claims allege substantial violations of federal law as well as violations of rules and regulations of the defendant CBOT and under these circumstances the purpose and function of the arbitrator would tend to conflict with the fair and impartial investigation of such claims; that the entrusting of the decision on issues involving violations of federal regulatory law to arbitrators drawn from the same forum and subject to the same laws as one of the parties to the arbitration violates equitable principles and fails to constitute a fair and impartial hearing as required by law; that the charges and countercharges raised in the

arbitration dispute are of sufficient volume and complexity to render questionable the efficacy of any decision by the Arbitration Committee of the defendant CBOT; that the plaintiffs and their interests would be prejudiced if required to attend and participate in arbitration proceedings at the present time in light of armed conflict in their homeland and principal place of business; that irreparable harm will result to the plaintiffs if the defendants are allowed to proceed in the instant matter before any other forum or contract market prior to a resolution of the issues raised in this complaint.

D. That this Court enter an order staying the arbitration proceedings now pending between plaintiffs and the defendant Bache Delaware before the Arbitration Committee of the defendant CBOT until such time as the judgment of this Court in this action shall have been entered.

E. That this Court grant to the plaintiffs such other and further relief as this Court may deem just and proper.

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EXHIBIT M

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

ABDALLAH W. TAMARI, LUDWIG W. TAMARI and FARAH W. TAMARI, co-partners doing business as WAHBE TAMARI & SONS CO.,
Plaintiffs,
vs.
BACHE & CO. (LEBANON) S.A.L., a Lebanese corporation, BACHE & CO. INCORPORATED, a Delaware corporation, and the BOARD OF TRADE OF THE CITY OF CHICAGO, an Illinois corporation,
Defendants.

No. 76 C 21

ANSWER OF BOARD OF TRADE OF THE CITY OF CHICAGO

Defendant Board of Trade of the City of Chicago (herein "Board of Trade"), by their attorneys, states in answer to the Complaint as follows:

1. Admits that jurisdiction is alleged to arise under the Commodity Exchange Act, 7 U. S. C. § 1 *et seq.*, under 28 U. S. C. §§ 1331(a), 1337, and 1350, and under principles of pendent jurisdiction; admits further that the amount in controversy is alleged to exceed ten thousand dollars ($10,000.00) exclusive of interest and costs; but denies that jurisdiction as to the Board of Trade exists under the Commodity Exchange Act, or under 28 U. S. C. §§ 1331(a), 1337, or 1350, or under principles of pendent jurisdiction; denies that the amount in

controversy as to the Board of Trade exceeds $10,000.00 exclusive of interest and costs; and denies each and every remaining allegation of Paragraph 1 of the Complaint.

2. Admits that this action is alleged to be an action for a declaratory judgment pursuant to 28 U. S. C. § 2201 for the purpose of determining a question of actual controversy between the parties; but denies that this is an action for a declaratory judgment pursuant to 28 U. S. C. § 2201 for the purpose of determining a question of actual controversy between plaintiff and the Board of Trade; and denies each and every other remaining allegation of Paragraph 2 of the Complaint.

3. On information and belief admits the allegations of Paragraph 3 of the Complaint.

4. On information and belief admits the allegations of Paragraph 4 of the Complaint.

5. Admits the allegations of Paragraph 5 of the Complaint.

6. Admits the allegations of Paragraph 6 of the Complaint.

7. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 7 of the Complaint and, therefore, denies each and every such allegation.

8. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 8 of the Complaint and, therefore, denies each and every such allegation.

9. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 9 of the Complaint and, therefore, denies each and every such allegation.

10. Admits that there is attached as Exhibit A to the Complaint a document purporting to be plaintiffs' complaint in Case Number 75 C 4189; lacks knowledge or information sufficent to form a belief as to the truth of the remaining allegations

of paragraph 10 of the Complaint and, therefore, denies each and every such allegation.

11. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 11 of the Complaint and, therefore, denies each and every such allegation.

12. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 12 of the Complaint and, therefore, denies each and every such allegation.

13. Admits that the defendant Bache Delaware had, at all times pertinent to the Complaint, membership privileges on the Board of Trade and clearing-member privileges with the Board of Trade Clearing Corporation; lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 13 of the Complaint and, therefore, denies each and every such allegation; and avers affirmatively that Bache Lebanon did not have membership privileges on the Board of Trade or clearing-member privileges with the Board of Trade Clearing Corporation at any pertinent time.

14. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 14 of the Complaint and, therefore, denies each and every such allegation.

15. Admits the allegations of Paragraph 15 of the Complaint.

16. Admits that a claim has been made by Bache Delaware that plaintiff is indebted to it in the amount of $376,366.96, but lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 16 of the Complaint and, therefore, denies each and every such allegation.

17. Admits that by letters dated February 7 and April 27, 1974, defendant Bache Delaware and plaintiffs notified Board of Trade that the services of the Board's Committee of Arbitra-

tion were desired to settle a difference between them, and that agreements submitting the difference to the Committee of Arbitration, the parties "desiring to avoid proceedings in the courts," were filed with the Board of Trade; denies each and every other remaining allegation of Paragraph 17 of the Complaint.

18. Admits that the documents filed with Board of Trade, as referenced in Paragraph 17, above, acknowledge that a dispute existed between plaintiffs and defendant Bache Delaware; denies each and every other remaining allegation of Paragraph 18 of the Complaint.

19. Denies that plaintiffs did not voluntarily submit to the jurisdiction of the Board of Trade inasmuch as plaintiffs, through their attorneys, filed an executed submission form submitting themselves and their dispute to the jurisdiction of the Committee of Arbitration of the Board of Trade, filed pleadings before said Committee, and participated in conferences and hearings conducted by or on behalf of said Committee; lacks knowledge or information sufficient to form a belief as to the truth of any and all remaining allegations of paragraph 19 of the Complaint and, therefore, denies each and every such allegation.

20. Denies the allegations of Paragraph 20 of the Complaint and avers that certain provisions of P. L. 93-463 did not become effective on that date.

21. Admits the allegations of Paragraph 21 of the Complaint.

22. Admits the allegations of Paragraph 22 of the Complaint.

23. Admits the allegations of Paragraph 23 of the Complaint.

24. Denies that the controversy between plaintiffs and Bache Delaware bears the docket No. 11022-125; admits the remaining allegations of Paragraph 24 of the Complaint; and avers affirmatively that evidenciary hearings relative to the controversy have commenced and are proceeding.

25. Admits that defendant Bache Lebanon is not a formal party to the controversy currently before the Committee of Arbitration of the Board of Trade but avers that the claims of plaintiff in that proceeding relate to the conduct and actions of Bache Lebanon; lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 25 of the Complaint and, therefore, denies each and every such allegation.

26. Denies the allegations of Paragraph 26 of the Complaint, and avers affirmatively that such allegations are palpably specious.

27. Admits the allegations of Paragraph 27 of the Complaint, and avers that said action was filed only after plaintiffs' agreement for arbitration had been on file for many months and the Committee on Arbitration had already begun preparations, with the cooperation of plaintiffs' counsel, toward the holding of hearings.

28. Denies that Board of Trade or the Committee of Arbitration continued the matter generally while seeking guidance from the Commodity Futures Trading Commission; admits the remaining allegations of Paragraph 28 of the Complaint.

29. Admits the allegations of Paragraph 29 of the Complaint.

30. Admits that the Committee of Arbitration met on October 23 and discussed said opinion; admits that the Committee directed counsel for the parties to file waivers with the Committee; but avers affirmatively that counsel for plaintiffs or Bache Delaware did not question or challenge said opinion at that time, and that the Committee nonetheless directed that waivers be furnished to preclude either party from raising jurisdictional questions or otherwise challenging the interpretive opinion at some future time after the rendering of an award by the Committee and because the parties through their counsel agreed to furnish such waivers; admits that the Committee's

meeting on October 30, 1975, was the last meeting of the Committee itself concerning the Arbitration prior to the filing of plaintiffs' complaint in Exhibit A, and avers affirmatively that the subject of waivers was not raised at said meeting and that the Committee by its actions at said meeting clearly asserted jurisdiction over plaintiffs notwithstanding the fact that the previously agreed to waiver of plaintiffs had not been received; denies each and every other remaining allegation contained in Paragraph 30 of the Complaint.

31. Admits the allegations of Paragraph 31 of the Complaint and avers affirmatively that the letter referenced therein was the first notice the Board of Trade received that plaintiffs in any way questioned the jurisdiction of the Committee of Arbitration.

32. Admits that on December 11, 1975, which followed the filing of plaintiffs' related complaint on December 10, 1975, the Committee of Arbitration met and in the course of the meeting advised counsel for plaintiffs that execution of waivers were not required and that the Committee would proceed to hold evidenciary hearings; avers affirmatively that the Committee on October 30, 1975 had met and issued a subpoena against plaintiffs notwithstanding the fact that plaintiffs had not executed a waiver as promised by plaintiffs' counsel; that by letter dated November 7, 1975 plaintiffs' counsel was advised, without reference to any waiver, that the documents subpoenaed were to be produced on December 11, 1975, at which time the Committee was to begin evidenciary hearings; that by letter dated December 5, 1975 plaintiffs' counsel was advised in connection with an analogous case that the Committee would proceed, having received the Commodity Futures Trading Commission interpretive opinion; that by letter dated December 8, 1975, plaintiffs' counsel was reminded, without reference to any waiver, that evidenciary hearings would commence on December 11, 1975, and that by letter dated December 11, 1975, plaintiffs' counsel was expressly advised that the execution of waivers had been rescinded; denies each and every other remaining allegation of Paragraph 32 of the Complaint.

33. Admits the allegations of Paragraph 33 of the Complaint, but avers affirmatively that staff and counsel to the Committee continued during such period to prepare the arbitration for hearings.

34. Denies the allegations of Paragraph 34 of the Complaint.

35. Admits that members of the Committee of Arbitration had knowledge of the interpretive opinion when its decision was reached; denies any and all remaining allegations of Paragraph 35 of the Complaint; states affirmatively that the Arbitrator's decision not to require receipt of waivers before proceeding was also based upon the earlier representations of counsel for both defendant Bache Delaware and the plaintiffs.

36. Admits that the opinion of the Commodity Futures Trading Commission refers in part to Section 412 of the Commodity Futures Trading Commission Act and that said section is accurately set forth, but denies each and every remaining allegation of Paragraph 36.

37. Admits that plaintiffs maintain that the provisions of Section 412 of the CFTC Act do not apply to the dispute pending before the Committee of Arbitration for the reasons set forth in Paragraph 37 of the Complaint; denies that the provisions of Section 412 do not apply; and denies each and every remaining allegation of Paragraph 37 of the Complaint.

38. Denies the allegations of Paragraph 38 of the Complaint and avers affirmatively that the agreement between plaintiffs and Bache Delaware to arbitrate the claims obviated the need to join Bache Lebanon as a necessary party to the arbitration; and further avers affirmatively that plaintiffs knew prior to their execution of their agreements to submit their dispute with Bache to arbitration that Bache Lebanon was not a party, that the Board of Trade had an investigative committee known as the Business Conduct Committee, that an award could be rendered

by the Committee of Arbitration prior to the undertaking of any investigation, that the Board of Trade is subject to federal regulatory law and that Bache Delaware is a member of the Board of Trade, and that the charges and countercharges raised in the dispute were numerous and complex, and that, notwithstanding the foregoing, plaintiffs voluntarily agreed to arbitrate their dispute and invoked the services of the Committee of Arbitration.

39. Denies the allegations of Paragraph 39 of the Complaint.

And further deny that Board of Trade has violated or is violating any provision of the Commodity Exchange Act or any principle of law or equity; and deny that plaintiff has incurred any loss or damage, or is entitled to any relief whatsoever (including costs or attorney's fees), by reason of any act, omission or decision of the Board of Trade.

Affirmative Defenses

In addition to the denials and defenses heretofore asserted by defendant Board of Trade, Board of Trade avers affirmatively as follows:

1. The complaint fails to state a claim for which relief can be granted.
2. The Court lacks jurisdiction of the subject matter of this action.
3. The allegations of the Complaint respecting violations of the Commodity Exchange Act are insufficient as a matter of law and, unless dismissed by the Court, should be referred to the Commodity Futures Trading Commission.

4. The Federal Arbitration Act compels that proceedings before the Court be stayed.

Respectfully submitted,

KIRKLAND & ELLIS
By /s/ PHILIP F. JOHNSON
/s/ JOHN H. STASSEN
Attorneys for Defendant Board of Trade of the City of Chicago

KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2000

EXHIBIT N

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

ABDALLAH W. TAMARI, et al.,
Plaintiffs,
vs.
BACHE & CO. (LEBANON) S.A.L., et al.,
Defendants.
No. 76 C 21

MOTION OF DEFENDANT, BACHE & CO., INCORPORATED, A DELAWARE CORPORATION, UNDER TITLE 9, U.S.C., SEC. 3, TO STAY THIS ACTION PENDING THE COMPLETION OF ARBITRATION PROCEEDINGS, AND MOTION UNDER SEC. 4 TO COMPEL ARBITRATION

Now Comes defendant, Bache & Co. Incorporated, a Delaware corporation, by N. A. Giambalvo, its attorney, and moves the Court (1) under Title 9, U.S.C., Sec. 3, for the entry of an order staying this suit until completion of the arbitration proceedings now pending before The Board of Trade of the City of Chicago; and (2) under Title 9, U.S.C., Sec. 4, for the entry of an order compelling plaintiffs to proceed to complete the arbitration proceedings now pending before The Board of Trade of the City of Chicago.

/s/ N. A. GIAMBALVO
N. A. Giambalvo
Attorney for Defendant, Bache & Co. Incorporated

Of Counsel:
BOODELL, SEARS, SUGRUE, GIAMBALVO & CROWLEY
One IBM Plaza
Chicago, Illinois 60611
222-9400

EXHIBIT O

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

ABDALLAH W. TAMARI, et al., *Plaintiffs,* vs. BACHE & CO. (LEBANON) S.A.L., et al., *Defendants.*	No. 76 C 21 (Related to Case No. 75 C 4189 before Judge Grady)

MOTION TO STAY PROCEEDINGS

Now comes Abdallah W. Tamari, Ludwig W. Tamari and Farah W. Tamari, doing business as Wahbe Tamari & Sons Co., plaintiffs, by their attorneys, Robert P. Howington, Jr. and Donald C. Shine, and move this Court for an order staying the proceedings pending before the Arbitration Committee of the defendant Board of Trade of the City of Chicago, involving the plaintiffs and the defendant Bache & Co. Incorporated and in support thereof submit the affidavit of Robert P. Howington, Jr. and the affidavit of Donald C. Shine.

Respectfully submitted,
ROBERT P. HOWINGTON, JR.
DONALD C. SHINE
Attorneys for Abdallah W. Tamari, Ludwig W. Tamari and Farah W. Tamari, Plaintiffs

Of Counsel:
HOWINGTON, ELWORTH & OSSWALD
135 South LaSalle Street
Chicago, Illinois 60603
(312) 236-7755

EXHIBIT P

Name of Presiding Judge, Honorable John F. Grady

Cause No. 75 C 4189 Date May 19, 1976

Title of Cause: Abdallah W. Tamari, et al. v. Bache & Co., et al.

May 20, 1976

For the reasons expressed in the court's Preliminary Opinion of April 21, 1976, this cause is hereby dismissed as against the defendant Bache & Co., Inc. The plaintiff is ordered to proceed with the arbitration now pending before the Board of Trade of the City of Chicago. This cause as to the remaining defendant, Bache & Co. (Lebanon) S. A. L., a Lebanese corporation, is continued to June 24, 1976, at 10 a.m. for a status report.

Grady, *J.*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-965

ABDALLAH W. TAMARI, LUDWIG W. TAMARI AND FARAH W. TAMARI, CO-PARTNERS DOING BUSINESS AS WAHBE TAMARI & SONS CO.,

Petitioners,

vs.

BACHE & CO. (LEBANON) S.A.L., A LEBANESE CORPORATION, BACHE & CO., INCORPORATED, A DELAWARE CORPORATION, AND THE BOARD OF TRADE OF THE CITY OF CHICAGO, AN ILLINOIS CORPORATION,

Respondents.

BRIEF AND APPENDIX FOR RESPONDENT, BACHE HALSEY STUART SHIELDS, INCORPORATED (FORMERLY BACHE & CO., INCORPORATED), IN OPPOSITION TO PETITION FOR CERTIORARI.

N. A. GIAMBALVO,
JAMES W. COLLINS,
LAWRENCE M. GAVIN,
Attorneys for Respondent.

BOODELL, SEARS, SUGRUE,
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One IBM Plaza—Suite 2650,
Chicago, Illinois 60611,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-965

ABDALLAH W. TAMARI, LUDWIG W. TAMARI AND FARAH W. TAMARI, CO-PARTNERS DOING BUSINESS AS WAHBE TAMARI & SONS CO.,

Petitioners,

vs.

BACHE & CO. (LEBANON) S.A.L., A LEBANESE CORPORATION, BACHE & CO., INCORPORATED, A DELAWARE CORPORATION, AND THE BOARD OF TRADE OF THE CITY OF CHICAGO, AN ILLINOIS CORPORATION,

Respondents.

BRIEF FOR RESPONDENT, BACHE HALSEY STUART SHIELDS, INCORPORATED (FORMERLY BACHE & CO., INCORPORATED), IN OPPOSITION TO PETITION FOR CERTIORARI.

Respondent prays that the petition for writ of certiorari be denied.

QUESTIONS PRESENTED.

The case does not present any questions worthy of review by this Court.

The only issues presented by this case are:

1. Whether the petition should be denied by reason of petitioners' failure to fully and accurately state the material facts required by Supreme Court Rules 23-1(e) and 23-4.

2. Whether the petition should be denied in the interest of orderly judicial procedure and because the issues in the case are cloudy and confused.

3. Whether the petition should be denied since the decision of the Court of Appeals is correct and in conformity with the decisions of this Court and of other courts.

4. Whether the petition should be denied because the decision below affects only the private parties to this litigation, and does not involve any important principle of law or matter of public policy.

ADDITIONAL STATEMENT OF THE CASE.

1. Introduction.

The statement of the case in the petition does not adequately set forth the facts material to the consideration of the questions presented, and substantially differs from the facts as they appear in the record. To correct these inaccuracies and omissions, the following additional statement of the case was deemed necessary.

The petition is predicated upon the alleged unenforceability of the arbitration provisions of the so-called customer agreements which were entered into prior to the date the dispute between the parties arose. The record shows that the petitioners voluntarily entered into several agreements to arbitrate their dispute *after* the dispute arose, all of which the petitioners have failed to bring to the attention of this Court.

The dispute between the petitioners and the respondent, Bache Halsey Stuart Shields, Incorporated (formerly Bache & Co., Incorporated) arose out of two commodity accounts maintained

by the petitioners with respondent's branch office in Beirut, Lebanon. Petitioners opened the first account on May 20, 1972, by signing a customer agreement (Pet. App. p. A35) containing, among numerous other provisions, an express provision to arbitrate all disputes arising out of the account. On September 22, 1972, petitioners opened a second account and at that time signed a second customer agreement containing similar provisions.

For over a full year following the opening of their first account, petitioners dealt with respondent without protest or objection. They engaged in many hundreds of very substantial trades in a large variety of commodity futures involving in excess of $2,000,000. The dispute arose in the fall of 1972.

2. The Several Agreements to Arbitrate Entered Into After the Dispute Arose.

It is clear that the petition is predicated upon the incorrect notion that the arbitration of the basic dispute resulted solely from the arbitration provisions of the customer agreements. That is simply not the fact, and this misconception should be immediately corrected. As the record reveals, the arbitration resulted from a number of separate voluntary agreements of the petitioners made months and years after the dispute arose.

The petitioners' charges of alleged fraud are directed solely at the customer agreements. Petitioners' main brief in the Court of Appeals set forth their position:

> "Further, the complaint alleges . . . that the customer agreements between Tamaris and Bache Delaware, which included the arbitration clause, had been obtained by fraud and coercion."

Petitioners have never questioned or challenged the arbitration agreements entered into *after* the dispute arose.

The facts submitted to the District Court, by affidavit and otherwise, firmly established that petitioners voluntarily entered into several arbitration agreements *after* the dispute arose.

First: Petitioners entered into telegraphic communications in January, 1974 in which they stated ". . . this is to inform you that we accept arbitration. . ." (Pet. App. pp. A38-40). This new arbitration agreement provided for different and additional items, including: (i) a different forum, viz., the Chicago Board of Trade (the customer agreements stipulated the arbitration forum as being either the New York Stock Exchange or the American Arbitration Association), and (ii) the inclusion of petitioners' counterclaim of $2,115,000.00. At this time, petitioners made no effort to assert the alleged fraud, or to disaffirm the customer agreements, or to refuse to arbitrate, or even to protest against arbitration. Petitioners did none of these things. Rather, they freely and voluntarily consented to a new arbitration agreement.

Second: Several months *after* the dispute arose, petitioners, with full knowledge of the alleged fraud, and with the advice of their attorneys, voluntarily entered into another arbitration agreement, viz., the Arbitration Submission Agreement of April 27, 1974 (Pet. App. A41). That agreement reads, in part:

> "CHICAGO BOARD OF TRADE
>
> ARBITRATION FORM
>
> WHEREAS, Differences and controversies are now existing and pending between Bache & Co. Incorporated, and Wahbe Tamari & Sons and Wahbe Tamari & Sons Co. in relation to business transactions.
>
> Now we, the undersigned Wahbe Tamari & Sons and Wahbe Tamari & Sons Co. and Bache & Co. Incorporated aforesaid, desiring to avoid proceedings in the courts, do hereby mutually agree to submit the said differences and controversies for decision, in accordance with the rules of the Board of Trade of the City of Chicago to a quorum of the present 'Committee of Arbitration' elected by said Board of Trade, or to substitutes for members of said Committee, as the case may be; and it is hereby understood and agreed by the parties hereto that any award or

> finding of said arbitration shall be subject to appeal to the regular elected 'Committee of Appeals' of said Board of Trade, as provided for appeals from the decisions of the 'Committee of Arbitration.'" (Pet. App. pp. A41-42.)

Third: Petitioners again voluntarily agreed to arbitrate their dispute, and again with the advice of their attorneys, many months *after* the dispute arose, by filing an *answer* to respondent's arbitration complaint to recover from petitioners a debit balance of $376,366.96. By their answer petitioners joined issue and sought a resolution of their dispute by arbitration (Resp. App. p. A28).

Fourth: Several months after the dispute arose, and again with the advice of their attorneys, petitioners again voluntarily agreed to arbitrate their dispute by filing their *counterclaim* against respondent seeking by arbitration to recover in excess of $2,500,000 (they sought to recover $2,115,000 together with an adjudication of no liability for the asserted debit balance) (Resp. App. p. A31).

Fifth: Petitioners also voluntarily agreed to arbitration by their participation in the arbitration proceedings. Over a long period of months petitioners and their attorneys extensively and substantially participated in the arbitration proceedings, including attendance at hearings, consideration of written interrogatories, production of documents, subpoenas duces tecum, oral depositions, cross-examination of respondent's witnesses and the introduction of oral testimony and documentary evidence.

Affidavits establishing all of these facts were submitted by respondent to the District Court. Petitioners did not at any time during the course of this litigation contest the making or existence of any of these several arbitration agreements. They submitted no counter-affidavits. Their pleadings, in fact, admitted these *post* dispute arbitration agreements. No evidentiary hearing was requested. On December 10, 1975 (almost two years after the arbitration proceedings had commenced) petitioners filed the *first* of their *four* actions in the District Court. Their

long complaint (37 paragraphs covering 23 pages) contained not one word of any alleged fraud or coercion concerning the arbitration agreements. Obviously, the after-thought of fraud and coercion had not yet occurred to petitioners. It did not occur to them until they filed their *second* action on January 6, 1976, *over two years after the dispute arose* and almost *two years after the arbitration proceedings were commenced* (Respondent's arbitration complaint was filed on February 8, 1974).

3. History of Arbitration.

On May 20, 1972, petitioners began trading in commodity futures on the Chicago Board of Trade ("CBOT") in two commodity accounts which they maintained with respondent. In the fall of 1973 a dispute arose in these accounts and the parties agreed to arbitrate the dispute before the CBOT.

On February 8, 1974, the arbitration proceedings were commenced before the CBOT when respondent filed its complaint in arbitration against petitioners seeking recovery of the debit balances remaining in their accounts. On September 5, 1974, petitioners filed an answer to the complaint and, also, a counterclaim against respondent.

On October 17, 1975, arbitration hearings commenced and continued to May 17, 1976.

On June 21, 1976, the arbitrators rendered their award (Resp. App. p. A25).

On June 28, 1976, the petitioners appealed the award to the Committee of Appeals of CBOT. On January 25, 1977, the Committee on Appeals affirmed the arbitrators' award (Resp. App. p. A28).

4. History of Litigation.

During the pendency of the arbitration proceedings, the Tamaris filed *three* separate actions in the United States District Court for the Northern District of Illinois, Eastern Division, all involving the subject of the arbitration proceedings.

Following the issuance of the arbitration award, the petitioners filed a *fourth* action in the same court seeking to vacate the award. Petitioners' petition is taken from the order of the Court of Appeals which affirmed the dismissal of the second action.

First Action.

On December 10, 1975, the petitioners filed the *first* of these actions against respondent, entitled *Tamari, et al.* v. *Bache, et al.*, Case No. 75 C 4189, in which they alleged the *same facts* as had been alleged in their counterclaim being arbitrated before the CBOT (Pet. App. Ex. K, p. A60). In addition to money damages, the petitioners prayed for an injunction enjoining respondent from "having the cause adjudicated in any other forum".

On April 21, 1976, the District Court entered its preliminary opinion. On May 19, 1976, the District Court entered its order dismissing the action ordering the petitioners to arbitrate (Pet. App. p. A103).

On June 16, 1976, the petitioners filed a notice of appeal from that order to the U. S. Court of Appeals for the Seventh Circuit. That appeal was dismissed by order of that court entered September 23, 1976, on petitioners' own motion to remand. That order of dismissal and for arbitration is still in force. That action is still pending against Bache & Co. (Lebanon) S.A.L., a foreign subsidiary of respondent.

Second Action.

On January 6, 1976, and while the *first* action was pending, the petitioners filed their *second* action against respondent entitled *Tamari, et al.* v. *Bache, et al.*, Case No. 76 C 21 (Pet. App. Ex. L, p. A76). The CBOT was also named as a defendant.

The complaint alleges that a dispute arose between petitioners and respondent sometime in 1973 concerning petitioners' commodity accounts, that the dispute was submitted to arbitration

before the Arbitration Committee of the CBOT on February 4, 1976, and that on September 17, 1974 petitioners filed their answer to respondent's arbitration complaint and also filed a counterclaim seeking over $2 million from respondent in the arbitration proceedings. Petitioners allege that the arbitration proceedings are invalid because (1) they were induced by fraud to enter into the customer agreements which contained provisions requiring arbitration, (2) amendments to the Commodity Exchange Act which became effective in April, 1975, deprived the Arbitration Committee of the CBOT of jurisdiction over the dispute, and (3) the arbitration proceedings were being conducted unfairly.

In this second action, the petitioners sought (as does their complaint in their *third* action) a declaratory judgment (1) barring the arbitration by the CBOT, (2) decreeing that a "fair and impartial determination" by the CBOT could not be had, (3) decreeing the petitioners' participation in the arbitration before the CBOT had been obtained by "fraud, coercion and duress", (4) decreeing that the arbitration was in violation of the Rules of the CBOT, and (5) decreeing that petitioners' interest would be "prejudiced" if they were required to proceed with the arbitration.

On April 21, 1976, the District Court entered its preliminary opinion expressly stating that the cause "should be dismissed" (Pet. App. p. A29). Without anything further being heard from the Tamaris, the District Court entered its order dismissing the action on May 19, 1976. On June 16, 1976, the petitioners filed a notice of appeal from that order to the U. S. Court of Appeals for the Seventh Circuit. On October 19, 1977, that court affirmed the order of dismissal, and ordered the petitioners to pay respondent's costs. On November 28, 1977, that court denied petitioners' petition for rehearing. The decision in this case is the subject of this petition.

Third Action.

On June 6, 1976, following the dismissal of their *second* action, the petitioners filed a *third* action entitled *Tamari, et al.* v. *Conrad, et al.*, Case No. 76 C 2071, involving the same subject matter as the *second* action. In this *third* action, the petitioners also named as defendants the individual arbitrators. Respondent moved to dismiss the action.

On November 15, 1976, the District Court dismissed the action. On December 14, 1976, petitioners filed a notice of appeal of the November 15, 1976, order to the U. S. Court of Appeals for the Seventh Circuit. On April 12, 1977, the Court of Appeals affirmed the order of the District Court, and again ordered the petitioners to pay respondent's costs. *Tamari* v. *Conrad*, 552 F. 2d 778 (7th Cir. 1977).

Fourth Action.

On January 27, 1977, the petitioners filed a *fourth* action against respondent, entitled *Tamari, et al.* v. *Bache, et al.*, Case No. 77 C 301 (Resp. App. p. A1). The complaint alleges that the arbitrators were arbitrary, prejudicial, biased, unfair and oppressive (as did the complaint in the *second* and *third* actions). The *fourth* complaint incorporates almost verbatim the allegations made in the *third* action regarding the alleged lack of authority of the arbitrators to preside over the arbitration proceeding. The complaint asks the District Court, pursuant to Section 10 of the Federal Arbitration Act, to vacate the award which was entered against the petitioners by the arbitrators and which was affirmed by the CBOT Appeals Committee. While this *fourth* action is still pending, the District Court has ordered all proceedings stayed pending the final resolution of this appeal.

REASONS FOR DENYING THE WRIT.

I.

Petitioners' Failure to State Essential Facts Required by Supreme Court Rules 23-1(3) and 23-4.

The petition should be denied by reason of (a) the failure of petitioners to state the essential facts material to the consideration of the questions presented, all as required by Rules 23-1(e) and 23-4, and (b) petitioners' misstating the grounds upon which the Court of Appeals affirmed the decision of the District Court.

Critical to the consideration of the questions presented for consideration by this Court were (1) the existence of several agreements to arbitrate voluntarily entered into by the petitioners *after* the dispute arose, and (2) the confused and piecemeal state of this litigation, including the pendency of the *first* and *fourth* actions in the District Court involving the same subject matter, all as set out in respondent's additional statement of the case.

Also critical is the petitioners' insistence on misstating and misinterpreting the grounds upon which the Court of Appeals affirmed the decision of the District Court (See *infra* pp. 16-17).

Having failed to fully and accurately state these essential facts, the petition is not in compliance with Rules 23-1(e) and 23-4. The petition should, therefore, be denied. *Erie Railroad Company* v. *Martin Kirkendale,* 266 U. S. 185, 186 (1924).

II.

The Issues in the Case Are Cloudy, Confused and Disorderly.

The petition should be denied in the interest of orderly judicial procedure. The issues in the case are, at best, cloudy and confused.

The Court of Appeals especially notes this in its opinion when it observed:

> ". . . the question is not without some difficulty as the issues are clouded." (Pet. App. p. A14)

Petitioners' penchant for filing numerous actions on the same subject matter has resulted in piecemeal litigation which, in the words of the Court of Appeals, is:

> "fractured and in some disarray" (Pet. App. p. A14),

and that this case:

> "is not a good situation for the expeditious and efficient resolution of the underlying controversy." (Pet. App. p. A14)

The decision of the Court of Appeals moved the case in the direction of eventual resolution. The denial of the petition here will achieve the same desirable result. Such denial would seem to be dictated by the concern for orderly judicial procedure. On the other hand, the granting of a review would (unfortunately) serve only to foster more "piecemeal" litigation, a matter which the Court of Appeals expressly pointed out (Pet. App. A, p. A16). *Maryland* v. *Baltimore Radio Show,* 338 U. S. 912, 918 (1949); *Erie Railroad Company* v. *Martin Kirkendale,* 266 U. S. 185, 186 (1924).

III.

Petitioners' Argument That the Commodity Exchange Act Renders the Arbitration Agreements Unenforceable Is Not Supported by Allegations of the Complaint and, Further, Is Without Merit.

A. Petitioners' Argument Is Not Supported by Allegations of the Complaint.

The primary reason petitioners advance for granting a writ of certiorari is that their customer agreements with respondent are adhesion contracts and that the arbitration clauses contained

in the customer agreements are therefore unenforceable under the provisions of the Commodity Exchange Act, 7 U. S. C. § 1 *et seq.*

The complaint, however, does not allege even in conclusory terms that the customer agreements were adhesion contracts, that petitioners were forced to accept the arbitration provisions contained in the customer agreements, or that the arbitration provisions themselves are invalid by virtue of provisions of the Commodity Exchange Act. The Court of Appeals noted that petitioners' complaint was deficient in this respect but nonetheless rejected their argument that the arbitration provisions contained in the customer agreements were unenforceable under the Commodity Exchange Act (Pet. App. p. A9).

As the allegations of the complaint do not support petitioners' theory to invalidate the arbitration provisions, the theory may not be urged here. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 37 (1976); *Weade* v. *Dickmann, Wright & Pugh*, 337 U. S. 801, 808 (1948).

B. Petitioners' Argument Is Without Merit.

Section 2 of the Federal Arbitration Act, 9 U. S. C. § 2, provides in part that an arbitration agreement:

> ". . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract . . ."

This Court has construed these words to mean exactly what they say. Arbitration agreements are valid and are to be enforced. *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564 (1960); *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395 (1967); *Scherk* v. *Alberto-Culver Company*, 417 U. S. 506 (1974).

This Court has also stressed that a court's jurisdiction in reviewing a charge that an arbitration agreement is invalid because of fraud in the inducement is limited to those cases

where the charge is fraud in the inducement of the arbitration clause itself. Where no claim is made that fraud was directed to the arbitration clause itself, an arbitration clause will be held to encompass arbitration of a claim that the contract generally was induced by fraud. *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395 (1967).

The Federal Arbitration Act and this Court's decisions thus clearly indicate that arbitration agreements are valid and are to be enforced. Petitioners, nonetheless, urge that the arbitration proceedings should be declared invalid. They argue in vague terms that the arbitration proceedings are the result of an adhesion contract and that therefore the proceedings are invalid as being inimical with the policy of the Commodity Exchange Act, placing heavy reliance on *Wilko* v. *Swan*, 346 U. S. 427 (1953).

Their argument is without merit for several reasons. Initially, while they argue they were induced by fraud to enter into the customer agreements generally, they do not claim fraud in the inducement of the specific arbitration provisions contained in those agreements. It is clear under *Prima Paint* that the charges of fraud which petitioners raise are for the arbitrators to decide.

Second, petitioners ignore the fact that they agreed to arbitrate their dispute *both before and after* the dispute arose (*supra* pp. 3 to 6). Their complaint in fact alleges that after the dispute arose they submitted the dispute to arbitration and filed a counterclaim against respondent in the arbitration proceedings (Pet. App. pp. A80-81, A88). Petitioners do not argue that these *post* dispute agreements are adhesion contracts or otherwise challenge the enforceability of these agreements. Their argument that the arbitration provisions contained in the customer agreements are unenforceable simply ignores the several *post* dispute agreements, any one of which renders their position untenable.

Third, the rationale of *Wilko* v. *Swan*, 346 U. S. 427 (1953), has no application to this case. *Wilko* held that an agreement

to arbitrate a future controversy arising under the Securities Act, 15 U. S. C. 77a *et seq.*, was unenforceable by virtue of the provisions of Section 14 of that Act. There is no statutory counterpart of Section 14 of the Securities Act in the Commodity Exchange Act, and the statutory basis for invalidating an arbitration contract which was present in *Wilko* is thus lacking here. In addition, *Wilko* dealt with an agreement to arbitrate *future* disputes arising under the securities laws. Here petitioners agreed to arbitrate both *before* and *after* the dispute arose.*

Finally, the agreement here has international dimensions. Petitioners are citizens of Lebanon. The transactions complained of were allegedly initiated in Lebanon (Pet. App. p. A77). Some of petitioners' trades were placed on the London Sugar Exchange and are thus not subject to United States law. The arbitration agreements should thus be enforced to preserve the orderliness and predictability essential to an international business transaction. *Scherk* v. *Alberto-Culver Co.*, 417 U. S. 506, 519 (1974).

It is thus clear that petitioners have not urged a valid basis to invalidate the arbitration proceedings. They agreed to arbitrate and they submitted their dispute to arbitration. Under the Federal Arbitration Act and under this Court's decisions, their agreements to arbitrate are binding and enforceable. The Court of Appeals was correct in holding that petitioners had not alleged or argued a theory upon which the arbitration proceedings could be declared invalid.

---

* Other cases relied on by Tamaris are similarly inapplicable. *Weissbuch* v. *Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 558 F. 2d 831 (7th Cir. 1977), *Ayers* v. *Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 538 F. 2d 532 (3rd Cir.) *cert. denied* 429 U. S. 1010, and *Macchiavelli* v. *Shearson, Hammill & Co.*, 384 F. Supp. 21 (E. D. Cal. 1974) each relied on § 29(a) of the 1934 Act to render void *prospective* agreements which would have required arbitration.

IV.

The Constitutional Issue Raised by Petitioners Is Without Merit.

Petitioners' argument that the dismissal of their complaint deprived them of due process finds no support in the record.

Initially, that argument is based upon the petitioners' misconception as to the grounds for affirmance by the Court of Appeals. As is shown *infra* pp. 16 to 17, the affirmance by the Court of Appeals was based upon grounds which petitioners choose to ignore, none of which required a hearing.

Further, there were no issues before the District Court which required a hearing. Petitioners contend that a hearing was required to determine the validity of the arbitration agreements, presumably in light of their charges of fraud. Petitioners, however, charged fraud in the inducement of the customer agreements generally, rather than fraud in the inducement of the specific arbitration provisions. The Court of Appeals correctly held, citing *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395 (1967), that no hearing was required on that issue since it was clearly subject to arbitration. In addition, the record before the District Court established the existence of several agreements to arbitrate entered into by petitioners *after* the dispute arose, none of which were challenged by petitioners. As to these *post* dispute arbitration agreements, no issue whatever existed which would necessitate a hearing.

Even if the argument as to the need for a hearing had merit, the Court of Appeals pointed out that the District Court entered its preliminary opinion on April 21, 1976 expressly stating that the cause should be dismissed. The order of dismissal was not entered until May 19, 1976, "without anything further being heard from Tamari" (Pet. App. p. A13). Petitioners had every opportunity to request a hearing and to object to the dismissal of their complaint without one but did not do so. This point

not having been presented to the District Court as error, it cannot be urged here! *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 37 (1976); *Weade* v. *Dickmann, Wright & Pugh*, 337 U. S. 801, 808 (1948).

V.

The Decision of the Court of Appeals Is Supported on Grounds Independent of Those Petitioners Claim as Error.

Petitioners seriously misstate the grounds upon which the Court of Appeals affirmed the dismissal of the declaratory judgment action by the District Court.

The Court of Appeals did not affirm solely on the basis of the existence of an agreement to arbitrate. Yet, all of petitioners' arguments for review by this Court are based upon their misconception that the Court of Appeals did so.

The decision of the Court of Appeals is plainly based upon a host of other grounds in the record. The Court of Appeals set out these additional grounds for affirming the dismissal: (i) the dismissal was one under Rule 12(b)(6), Federal Rules of Civil Procedure (the failure to state a claim upon which relief can be granted), and not on the basis of summary judgment (Pet. App. pp. A6 and 7); (ii) the dismissal was proper on the basis of what was apparent from the pleadings (Pet. App. p. A7); (iii) the dismissal was a proper exercise of the discretionary power of the District Court in a declaratory judgment action (Pet. App. pp. A7 and A14) especially since the action could not provide a comprehensive solution of the underlying dispute or any substantial portion of it (Pet. App. p. A15); (iv) the dismissal was proper because the complaint did not directly attack the arbitration provisions, but, rather, the whole contract between the parties, and that the issue was subject to arbitration (Pet. App. p. A13); and, (v) the dismissal was a proper exercise of the judicial discretion of the District Court arising out of the pendency of other actions involving the same subject matter (Pet App. p. A15).

The affirmance by the Court of Appeals of the dismissal by the District Court was proper under any one of these several grounds. Respondents do not attack or question any of these grounds. In fact, not the slightest mention of any of them is made in the petition.

It follows then that petitioners' argument that the decision of the Court of Appeals is contrary to the decisions of this Court and of other courts is wholly lacking in merit.

VI.

The Questions Presented Are Not of Any Gravity and General Importance.

The petition should be denied because the questions presented for review are not of any gravity and general importance. The issues raised in the petition will affect only the private parties involved in this case.

After the dispute between petitioners and respondent arose and after it was submitted for arbitration, the Commodity Futures Trading Commission Act (Public Law No. 93-463) amended the Commodity Exchange Act. The amendments, which became effective April 21, 1975, require contract markets to provide a fair and equitable arbitration procedure to settle customers' claims. 7 USC § 7(a)(11). The Commodity Futures Trading Commission has since promulgated regulations concerning the arbitration procedures which must be followed and the requirements which must be met to assure that a customer's agreement to arbitrate is voluntary. 41 F. R. 27520.

It is thus apparent that any ruling by this Court on the issues of this case will have limited precedential value. It would affect only those commodity claims which arose prior to the effective date of the amendments to the Commodity Exchange Act, namely those claims which arose before April 21, 1975.

Furthermore, the decision of the Court of Appeals is one substantially of petitioners' own making. They have unfairly

burdened both the Court of Appeals and the District Court with piecemeal suits and appeals, and they continue to persist in these tactics. Petitioners' misuse of the federal court system has resulted in a hodge-podge of lawsuits and appeals. Petitioners' unhappiness with the consequences of their conduct is no grounds for review by this Court.

CONCLUSION.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

ABDALLAH W. TAMARI, LUDWIG W. TAMARI and FARAH W. TAMARI, co-partners doing business as WAHBE TAMARI & SONS, CO.,
Plaintiff

vs.

BACHE HALSEY STUART INC. (formerly Bache & Co. Incorporated), a Delaware corporation,
Defendants.

No. 77 C 301

COMPLAINT

Abdallah W. Tamari, Ludwig W. Tamari and Farah W. Tamari, doing business as Wahbe Tamari & Sons Co., plaintiffs, by their attorneys, file this action against defendant Bache Halsey Stuart Inc. (formerly Bache & Co. Incorporated) a Delaware corporation, and allege as follows:

1. This is an action to vacate, set aside, and hold null and void an award of the Arbitration Committee, as affirmed by the Appeals Committee, of the Board of Trade of the City of Chicago, pursuant to the provision of 9 U. S. C. § 10.

2. The matter in controversy exceeds the amount of $10,000.00 exclusive of interest and costs. Jurisdiction is conferred on this Court by 28 U. S. C. § 1331(a), 28 U. S. C. § 1332, 28 U. S. C. § 1337 and 28 U. S. C. § 1350.

3. Plaintiffs Abdallah W. Tamari, Ludwig W. Tamari and Farah W. Tamari ("Tamaris") are citizens and legal residents of Lebanon, where, among other things, they do business under the style of Wahbe Tamari & Sons Co.

4. Defendant Bache Halsey Stuart Inc. (formerly Bache & Co. Incorporated) ("Bache Delaware") is a corporation organized under the laws of Delaware, and it does, and has a place of business in Chicago, Illinois.

5. Arbitration proceedings between Tamaris and Bache Delaware before the Arbitration Committee and the Appeals Committee of the Board of Trade of the City of Chicago ("CBOT") were concluded by decision of the Appeals Committee on January 25, 1977.

6. The circumstances under which the arbitration proceeding between Tamaris and Bache Delaware came before the CBOT and the Arbitration and Appeals Committees are described hereinafter.

7. On or about May 20, 1972 and September 22, 1972 Tamaris executed customer agreements with respect to two separate commodity futures trading accounts on Bache Delaware forms which incorporated a pre-dispute arbitration clause which provided as follows:

> "14. This contract shall be governed by the laws of the State of New York, and shall inure to the benefit of your successors and assigns, and shall be binding on the undersigned, his heirs, executors, administrators and assigns. Any controversy arising out of or relating to my account, to transactions with or for me or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules then obtaining of either the American Arbitration Association or the Board of Governors of the New York Stock Exchange as I may elect, except that any controversy arising out of or relating to transactions in commodities or contracts relating thereto, whether executed or to be executed within or outside of the United States shall be settled by arbitration in accordance with the rules then

> obtaining of the Exchange (if any) where the transaction took place, if within the United States, and provided such Exchange has arbitration facilities or under the rules of the American Arbitration Association as I may elect. If I do not make such election by registered mail addressed to you at your main office within five days after demand by you that I make such election then you may make such election. Notice preliminary to, in conjunction with, or incident to such arbitration proceeding, may be sent to me by mail and personal service is hereby waived. Judgment upon any award rendered by the arbitrators may be entered in any court having jurisdiction thereof, without notice to me."

(A copy of this customer agreement is attached hereto as Exhibit A.)

8. The execution of the forms referred to in paragraph 7, above, by Tamaris resulted from solicitations of Bache & Co. (Lebanon) S. A. L. ("Bache Lebanon") to have open commodity futures accounts. The circumstances of such solicitations, the opening of the commodity futures accounts, the transactions in commodity futures contracts in such accounts and the dispute that subsequently occurred between Tamaris and Bache Delaware are described in Tamaris' Answer and Counterclaim filed with the CBOT (a copy of which is attached hereto as Exhibit B) and in the complaint filed in this Court captioned *Abdallah W. Tamari, Ludwig W. Tamari and Farah W. Tamari, co-partners doing business as Wahbe Tamari & Sons Co., Plaintiffs,* v. *Bache & Co. (Lebanon) S. A. L., a Lebanese corporation and Bache & Co. Incorporated, a Delaware corporation, Defendants,* Case No. 75 C 4189 (a copy of which is on file in this Court and attached hereto as Exhibit C.)

9. On or about January 9, 1974, Bache Delaware, claiming that Tamaris owed it the sum of $376,366.96 for debit balances in Tamaris two commodity accounts, notified the Tamaris, in writing, that it was invoking the pre-dispute arbitration clause contained in its customer agreements with the Tamaris and

demanded that they elect as the arbitration forum, either the Board of Governors of the New York Stock Exchange or the American Arbitration Association within five days from the date of demand and further notified them that, if they did not, Bache Delaware would select the arbitration forum. (A copy of such notification is attached hereto as Exhibit D.)

10. On or about January 12, 1974, Tamaris notified Bache Delaware according to the pre-dispute arbitration clause that the arbitration forum should be the exchange where the commodity transactions took place, i.e., the CBOT. Tamaris further requested that the arbitration include their claim against Bache Delaware for recovery in the amount of $2,115,000. (A copy of such notification is attached hereto as Exhibit E.)

11. On or about February 1, 1974, Bache Delaware filed its claim, labeled a "Complaint", against Tamaris with the CBOT. (A copy of this "Complaint" is attached hereto as Exhibit F.) Such "Complaint" was filed prior to the time any arbitration submission agreement had been executed by the parties.

12. On or about April 27, 1974, Tamaris executed a submission agreement furnished to them by the CBOT for the arbitration of the dispute between Tamaris and Bache Delaware. (Exhibit G attached hereto.)

13. On or about September 17, 1974, Tamaris filed their "Answer and Counterclaim" to the "Complaint" of Bache Delaware, in which the Tamaris counterclaimed to recover the sum of $2,150,000 which they had previously paid to Bache Delaware for losses suffered in their accounts and also requested that it be adjudicated that the Tamaris did not owe the amount of $376,366.96 claimed by Bache Delaware.

14. Tamaris' counterclaim filed with the CBOT, alleged, among other things, the following violations of law and exchange rules by Bache Delaware:

(a) The churning of Petitioners' accounts in violation of Section 4b of the Commodity Exchange Act, Rule

146 of the CBOT and similar rules of other exchanges;

(b) Violations of Sections 1.33, 1.33a(a)(2), 1.33a(b), of the Regulations promulgated under the Commodity Exchange Act;

(c) Violations of Regulation 1990 of the CBOT, Rules 145 and 146 of the CBOT and similar rules and regulations of other exchanges;

(d) Violations of Rule 210 of the CBOT, paragraphs 8, 12, 14 and 15 of Regulation 1822 of the CBOT and similar rules and regulations of other exchanges relating to margin requirements; and

(e) Other violations of Section 4b of the Commodity Exchange Act and also breaches of fiduciary duty.

15. In the spring of 1975, subsequent to the filing of Tamaris' Answer and Counterclaim with the CBOT, the CBOT questioned, because of the amendments to the Commodity Exchange Act, which became effective on April 21, 1975, whether or not the Arbitration Committee of the CBOT had jurisdiction to entertain arbitration of the dispute between Bache Delaware and Tamaris and then continued the matter generally. As of that time the Arbitration Committee had not met with respect to the dispute between Tamaris and Bache Delaware; nothing was pending before the Committee concerning such matter; and the CBOT had not yet determined whether or not it would hear the matter.

During the summer and early fall of 1975, Tamaris, through their attorney, communicated with attorneys for the CBOT as to the status of the matter. The response was that the CBOT, through its attorneys, was to seek a ruling from the Commodity Futures Trading Commission ("CFTC") as to whether or not the CBOT could exercise jurisdiction over the matter.

17. In July of 1975, the staff of the CFTC issued an interpretive opinion to the effect that the arbitration proceedings

brought by customers pending before the effective date (April 21, 1975) of the amendments to the Commodity Exchange Act, were not abated by said Act. (The opinion is attached hereto as Exhibit H.)

18. It was not until on or about October 16, 1975, that the first meeting was held by the Arbitration Committee of the CBOT respecting the dispute between Tamaris and Bache Delaware. At that meeting, among other things, the question was raised by counsel for Bache Delaware as to whether or not the Arbitration Committee had authority to proceed with the arbitration in view of the interpretive opinion of the staff of the CFTC. At that time, the applicability of such opinion was rejected by the Arbitration Committee, stating that it would proceed only if the parties would execute waivers waiving any objections to the Committee's jurisdiction to proceed in the matter. The Committee, through its counsel, further stated that it would draft a form of waiver to be executed by the parties. The Committee at that meeting, also rejected the applicability of such interpretive opinion to another arbitration matter which had come before the Committee. The Committee, however, did tentatively set the date of December 11, 1975, to proceed with the arbitration between the Petitioners and Bache Delaware, provided that the parties executed the waivers waiving any objections to the Committee's jurisdiction.

19. On or about October 29, 1975, the attorney for the Tamaris received a letter dated October 27, 1975, from house counsel for the CBOT. (A copy of that letter is attached hereto as Exhibit 1.) The letter, in pertinent part, provides as follows:

> "Enclosed is a form which the Arbitration Committee *requires* your client to sign before it will begin hearings on this matter. If the notarization is taken anywhere other than the State of Illinois, the Committee will require a certification of notarial acknowledgement indicating the authority of the notary to so notarize the document." (Emphasis supplied.)

20. On or about October 30, 1975, the Arbitration Committee of the CBOT again met. Among other things, the question was raised by the attorney for Bache Delaware as to whether or not the Arbitration Committee could proceed with the arbitration between Tamaris and Bache Delaware in light of the interpretive opinion of the CFTC. Again, the applicability of such opinion was rejected by the Arbitration Committee as to both the arbitration matter between Tamaris and Bache Delaware and the other arbitration matter referred to above. Again, it was stated that the aforesaid form of waiver was required to be executed by the parties before the Arbitration Committee would proceed in the arbitration but that, if such waivers were executed, hearings would begin on December 11, 1975.

21. In a letter dated and hand-carried to the CBOT on or about December 9, 1975, the Arbitration Committee was advised of Taramis' refusal to execute the waiver required by the CBOT and of Tamaris' intention to seek relief in a court proceeding. (A copy of that letter is attached hereto as Exhibit J.)

22. On or about December 10, 1975, Tamaris filed a complaint against Bache Delaware and Bache Lebanon in this Court. The complaint, seeking recovery of $2,115,000 under the Commodity Exchange Act, 7 U. S. C. § 1 *et seq.*, is identified in paragraph 8, *supra*.

23. On or about December 11, 1975, Tamaris filed a complaint with the Business Conduct Committee of the CBOT against Bache Delaware. (A copy of that complaint is attached hereto as Exhibit K.)

24. On or about December 10, 1975, Tamaris filed a complaint with the CFTC against Bache Delaware. (A copy of that complaint is attached hereto as Exhibit L.)

25. At or about 1:00 P.M. on December 11, 1975, Tamaris' counsel received a letter by messenger from the house counsel for the CBOT which stated, among others things, that

the Arbitration Committee would convene that day at 3:00 P. M. with respect to the matter involving Tamaris and Bache Delaware. House counsel also served in an advisory capacity to the Arbitration Committee. (A copy of such letter is attached hereto as Exhibit M.)

26. On December 11, 1975, at approximately 3:00 P. M., which followed the filing of Tamaris' complaint in this Court on December 10, 1975, the Arbitration Committee met and at that meeting advised Tamaris' counsel for the first time that the execution of the required waiver, referred to in paragraph 18, 19 and 20 above, was no longer required, and, further, that the Committee had decided to proceed immediately with the hearing of the arbitration matter.

27. The Arbitration Committee had never met or heard any evidence concerning the arbitration matter prior to December 11, 1975. By proceeding with the matter, the Arbitration Committee without notice contradicted and contravened its earlier ruling not to proceed with the matter unless and until it received the required waivers. Notwithstanding its earlier insistence upon executed waivers, and Tamaris' reliance thereon, the Arbitration Committee proceeded over Tamaris' objection to receive evidence even though the Tamaris had elected to refuse to sign the required waivers and proceed in this Court for relief under the Commodity Exchange Act, and had so informed the Arbitration Committee prior to their December 11, 1975.

28. The letter of December 11, 1975 to Tamaris' counsel from the house counsel of the CBOT (a copy of which is attached hereto as Exhibit M) refers to a letter of house counsel dated December 5, 1975 concerning another arbitration matter in which Tamaris' counsel was counsel for one of the parties. Referring to the earlier letter dated December 5, 1975, house counsel stated as follows in his letter of December 11, 1975:

> "In that letter I enclosed a copy of CFTC interpretive letter #75-1 which indicates that matters submitted to arbitration prior to April 21, 1975 may be heard without regard to the Section 5a(11) restrictions of the Act. Therefore, as you well know, since the jurisdictional issues in that case are identical to the jurisdictional issues in the Bache-Tamari case, the reasons for your clients to execute the waiver has been obviated."

29. Contrary to house counsel's urging, the jurisdictional issues in the other case are not identical to the jurisdictional issues in the instant case. Secondly, the CFTC interpretive letter (#75-1) had been issued and was known prior to the October meeting's Arbitration Committee, and the Committee had still insisted on executed waiver to jurisdiction. Thirdly, the letter while dated December 5, 1975, it was post-marked Monday, December 8, 1975 and was not received by the office of Tamaris counsel until Wednesday, December 10, 1975.

30. At no time prior to December 10, 1975, had Tamaris' counsel been apprised by anyone associated with the CBOT or with the Arbitration Committee, or by anyone, that the CBOT or the Arbitration Committee had decided to proceed with the other arbitration matter, nor prior to December 11, 1975, had Tamaris' counsel been apprised that the CBOT or the Arbitration Committee had decided to proceed with the arbitration between Tamaris and Bache Delaware, unless Tamaris executed the required waivers.

31. On December 11, 1975 and thereafter, at the direction of the assigned panel of the Arbitration Committee, and over the continuing objections of Tamaris, oral hearings were also held respecting the matter. The additional hearing dates were January 7, 1976, January 14, 1976, January 26, 1976, February 11, 1976, February 12, 1976, March 2, 1976, March 9, 1976, April 7, 1976, April 8, 1976 and May 17, 1976. Hearings were also scheduled for May 18, 1976, May 19, 1976, May 20, 1976, May 26, 1976 and May 27, 1976.

32. The conduct of the CBOT and the assigned panel members of the Arbitration Committee during the hearings listed in paragraph 31 hereof was arbitrary, prejudicial, biased,

unfair and oppressive with respect to the rights of Tamaris, in the following respects, among others:

(a) On or about December 11, 1975, being informed and well knowing that Tamaris had refused to sign the required waiver, waiving objection to their jurisdiction and being informed and well knowing that it was the Tamaris' intention to seek relief against Bache Delaware in a court proceeding (Exhibit J), the Committee panel reversed itself on the matter of requiring the waiver, ignored or disregarded the existence of the intervening federal court case identified in paragraph 8 and ordered that the evidentiary proceedings commence immediately, all to the detriment of Tamaris;

(b) The two-hour notice that the Committee panel gave to Tamaris that it would proceed with the matter on December 11, 1975, was both unreasonable and also unfair to Tamaris in light of the circumstances and representations of the Committee panel that it would not proceed with the arbitration matter unless Tamaris executed the waiver required by the Committee;

(c) The Committee panel misled and deceived the Tamaris in that it had represented to Tamaris that it would not proceed on December 11, 1975 with the arbitration matter unless Tamaris executed a waiver waiving any and all objections to the jurisdiction of the CBOT over the matter;

(d) On or about February 20, 1976, Tamaris learned, for the first time, that it was Bache Delaware that had requested the ruling which had led to the interpretive opinion of the staff of the CFTC (Exhibit H hereof). This was pointed out to the Arbitration Committee at a hearing held on March 2, 1976. In a letter dated

March 8, 1976, (a copy of which is attached hereto as Exhibit U) counsel questioned the propriety of such procedures pointing out that Tamaris had no opportunity to provide any imput with respect to the letter of Bache Delaware which requested a ruling for the Commission. Since the Commission was asked to interpret Section 5a(11) of the Commodity Exchange Act, as amended, it was extremely important to know how the question to the Commission was framed. For example, was the Commission advised that the arbitration was one in which the initiating party was an exchange member and futures commission merchant, or that the arbitration arose out of an argument to arbitrate entered into prior to the time that the dispute arose, or that the arbitration was involuntary. The failure of the Committee panel to advise Tamaris that Bache Delaware had requested a ruling from the Commission's staff so as to afford Tamaris on opportunity to submit input on the question operated to prejudice of Tamaris.

(e) Despite the terms of the submission agreement, applicable rules and regulations of the CBOT and the law, the CBOT and the Arbitration Committee failed to provide Tamaris with a legally constituted panel of members of that Committee to hear the arbitration proceeding. Instead the selection of the Committee panel did not comply with the requirements of the submission agreement, applicable rules and regulations of the CBOT or law. In this connection, see the letter of Tamaris' counsel, dated May 7, 1976, the contentions of which were summarily dismissed by the Committee at a hearing held on May 17, 1976, without giving any grounds for such rejection. (A copy of the letter of May 7, 1976 is attached hereto as Exhibit N); (see also paragraph 35 through 59, below.)

(f) During the course of the Arbitration proceedings there was a continuing and uniform failure on the part of the Committee to rule on motions and objections of Tamaris and when rulings were made, a failure to state grounds for such rulings;

(g) The Committee panel proceeded over Tamaris' objections to entertain the arbitration matter even though the matter presented numerous and complex issues of law and fact and was of a nature and scope which rendered it inappropriate for arbitration;

(h) The Committee panel refused to postpone hearings despite its knowledge that certain material documents necessary to the defense of the Tamaris and the presentation of their claim were located in Lebanon and not accessible to them because of the civil war there;

(i) The Committee panel issued a subpoena duces tecum directing Tamaris to produce certain documents which were located in Lebanon and not in their possession or control and despite the civil war in Lebanon, the Committee panel made unfair and unreasonable demands for their immediate production;

(j) The Committee panel refused to issue subpoenas ordering Bache Delaware to produce documents determinative of the issue of whether or not Tamaris' commodity accounts were properly margined or under margined on the ground that Tamaris were not entitled to assert the claim that Bache Delaware violated CBOT rules and regulations relating to margin requirements;

(k) The Committee panel refused to issue subpoenas requiring certain officers and employees of Bache Delaware to appear and testify on the ground that the Committee desired to hear the testimony of Tamaris as a condition precedent;

(l) The Arbitration Committee refused to disqualify the panel hearing the matter despite the fact that its composition did not meet the requirements of the submission agreement, the rules of the CBOT, or law and thus was illegally constituted and without authority to make a valid award.

(m) The Arbitration Committee refused to disqualify the panel hearing the matter despite the fact that from January, 1976 through April, 1976 one of the members of the panel had been secretly negotiating with the Bache Delaware representative, designated by Bache Delaware to appear on its behalf and to testify, for the purpose of employing him;

(n) The rulings made by the Arbitration Committee from January through April, 1976 are tainted by the participation therein of the panel member who was contemporaneously engaged in mutually beneficial, undisclosed, repeated private discussions with the Bache Delaware representative at the arbitration proceedings;

(o) The legal advisor to the Arbitration Committee, who was house counsel of the CBOT, participated in the making of rulings affecting the interests of the Tamaris in the arbitration proceeding at the same time that he was acting as an advocate for the CBOT, which was an adversary to the Tamaris in the case before this Court which concerned the same subject matter;

(p) The Committee panel scheduled protracted evidentiary hearings (four consecutive days and thereafter to be followed by two consecutive days) and directed Tamaris, over their objections, to give testimony during such hearings despite the fact the Committee had refused to issue subpoenas duces tecum ordering Bache Delaware to produce certain documents which

were material and necessary to the proper presentation of Tamaris' testimony and case;

(q) The Committee panel, directed the order of proof of Tamaris' case;

(r) The Committee panel scheduled hearings and refused to postpone such hearings despite its knowledge that the scheduling of such hearings interfered with the preparation of Tamaris cases in this Court;

(s) Throughout the proceedings the Committee panel, by its own conduct and rulings and by its deference to the wishes of counsel for Bache Delaware and tolerance of his intemperate conduct toward the Tamaris and their counsel, ceased functioning as fair and impartial arbitrators and became activists on behalf of Bache Delaware; (Transcripts of all proceedings are incorporated herein by reference and submitted to this Court under separate cover. Bache Delaware will not be served with copies since their counsel already has copies.)

(t) The Committee panel refused to postpone an evidentiary hearing despite the illness of Tamaris' counsel;

(u) The CBOT and the Arbitration Committee, by refusing, in the Spring of 1975, either to assert jurisdiction over the matter or determine whether or not it would hear the matter, placed Tamaris in a legal uncertainty as to the status of the matter vis-a-vis the CBOT and the Committee, all to the prejudice of Tamaris;

(v) Notwithstanding the protracted delay caused by the refusal of the CBOT and the Arbitration Committee to assert jurisdiction over the matter, the Committee panel then ignored or summarily dismissed the fact that the civil war in Beirut, Lebanon severely crippled Tamaris' ability to proceed. Incredibly, the Committee repeatedly and arbitrarily accused Tamaris of delaying the proceedings;

(w) Despite the fact that Tamaris' counterclaim, filed with the CBOT on September 17, 1974, alleged a number of violations of the Commodity Exchange Act and CBOT rules and regulations, to Tamaris' knowledge the CBOT Business Conduct Committee never undertook any investigation of Bache Delaware;

(x) On or about December 11, 1975, the Arbitration Committee was specifically advised that Tamaris had formally requested the Business Conduct Committee to conduct an investigation of the conduct of Bache Delaware vis-a-vis violations of CBOT Rules. However, the Arbitration Committee failed to acknowledge that the dual conflicting functions of the CBOT as forum and investigator placed it in a position of conflict of interest.

(y) On or about January 7, 1976, the CBOT and the Committee panel were informed that the Tamaris had filed suit in this Court seeking among other things, to enjoin the CBOT and the Committee from conducting further hearings. Despite knowledge of the fact that the suit rendered the CBOT and the Committee adversaries of Tamaris, the Committee and its counsel disregarded the conflict of interests that existed and continued to schedule proceedings and entertain the arbitration matter. The suit is identified as *Abdallah Tamari, et al.* v. *Bache & Co. (Lebanon) S. A. L. et al.*, Number 76 C 21, and is on appeal.

(z) The Arbitration Committee applied and relied upon a CFTC staff opinion, which purportedly directly applied to the subject arbitration matter, when in fact it did not because substantial aspects of the question had not been fairly and completely presented to the CFTC staff for consideration.

(aa) Notwithstanding Rule 183 of the CBOT and Section 7 of the Legislative Act to Incorporate the Board of Trade, Chicago, and notwithstanding Tamaris continuing objections that their presence was involuntary the Committee persisted in conducting proceedings. Moreover, the Committee proceeded when it was under no legal compulsion to do so and thereby granted Bache Delaware the relief Bache Delaware otherwise sought by its Motion To Compel Arbitration filed in the federal court in case number 75 C 4189, described in paragraph 22, above. This act of the Committee panel further manifested its bias and prejudice against Tamaris.

(bb) The Secretary of the CBOT, who, under CBOT Rule 77(c), is responsible for the conduct of proceedings before the Arbitration and Appeals committees, became employed by Bache Delaware during the course of the proceedings.

33. In addition to the above recited instance of error and prejudice, the panel of arbitrators hearing this matter was illegally constituted and without jurisdiction or legal authority to render a valid award. The applicable facts and CBOT Rules follow.

34. On or about April 27, 1974, Tamaris in connection with the controversy involving them and Bache Delaware, executed an arbitration submission agreement furnished to them by the CBOT which provided in part, as follows:

> "[The parties] do hereby mutually agree to submit the said differences and controversies for decision, in accordance with the rules of the Board of Trade of the City of Chicago to a quorum of the present 'Committee of Arbitration' elected by said Board of Trade, or to substitutes for members of said Committee, as the case may be. . . ."

(A copy of the arbitration submission agreement is attached hereto as Exhibit O.)

35. Rule 182 of the CBOT, as applicable here, provides:

> "Five members of [the Committee of Arbitration] shall constitute a quorum."

(A copy of Chapter 6 of the Rules of the CBOT, insofar as they relate to arbitration (Rules 180-199), is attached hereto and incorporated herein as Exhibit P.)

36. On April 27, 1974, the date on which Tamaris executed the arbitration submission agreement, the Arbitration Committee was composed of the following ten persons:

William L. Allen
William J. Griffin, Jr.
Jordan A. Hollander
Neal E. Kottke
James F. Shea
William P. Conrad, Jr.
Martin J. Dempsey, Jr.
Stuart A. Newman
Edward B. Rhea, Jr.
Jerome M. Spielman

Of this number, only Messrs. Conrad, Newman and Rhea were appointed to the panel of arbitrators considering the arbitration matter involving Tamaris and Bache Delaware. No explanation or statement has ever been made or offered by the CBOT as to why none of the other members of the Arbitration Committee at the time of the execution of the arbitration submission agreement were appointed to complete the quorum of five panel members as required by the submission agreement.

37. Instead, William P. Conrad, Jr., Stuart A. Newman, Edward B. Rhea, Jr., Robert B. Armstrong, David Baby, Lawrence M. Corbin, Donn R. Farr and Ralph D. Klopfenstein were members of the Committee panel. The election of these CBOT members to the membership on the Arbitration Committee occurred as follows:

(a) The two year terms of office of Messrs. Allen, Griffin, Hollander, Kottke and Shea on the Committee ex-

pired on or about January 14, 1975, and the terms of three of the panel members—Conrad, Newman and Rhea—as well as those of Messrs. Dempsey and Spielman, expired on about January 20, 1976.

(b) On or about January 20, 1975, the following five CBOT members were elected members of the Arbitration Committee as successors to Messrs. Allen, Griffin, Hollander, Kottke and Shea, whose terms of office had expired on or about January 14, 1975:

Robert B. Armstrong
David Baby
Lawrence M. Corbin
Donn R. Farr
Ralph D. Klopfenstein

These CBOT members were not members of the Arbitration Committee on April 27, 1974, the date on which the Tamaris executed the arbitration submission agreement.

38. Tamaris have no knowledge of who appointed Messrs. Conrad, Newman, Rhea, Armstrong, Baby, Corbin, Farr and Klopfenstein to this panel of arbitrators or why these particular persons were appointed to the panel or why other Committee members were not appointed. Tamaris did not participate in such appointment nor were they consulted. Rather, Tamaris relied upon the CBOT and the Arbitration Committee to follow the terms of the submission agreement and the rules of the CBOT in this regard.

39. It was not until subsequent to April 8, 1976, as a consequence of the events at the hearings on April 7 and 8, 1976, that Tamaris learned when the various panel members had been elected to the Arbitration Committee and that Messrs. Armstrong, Baby, Corbin, Farr and Klopfenstein were not members of the Arbitration Committee on April 27, 1974, the date on which Tamaris executed the arbitration submission agreement.

40. It was the duty of the Arbitration Committee and the panel members to determine that the panel was validly constituted in accordance with the term of the arbitration submission agreement, the rules of the CBOT and applicable law.

41. It was the duty of each member of the Arbitration Committee and panel members to determine whether or not he met the qualifications to serve on the panel as prescribed by the submission agreement and the rules of the CBOT.

42. Each panel member had read the submission agreement and, being a member of the CBOT and the Arbitration Committee, had knowledge of the CBOT rules relating to arbitration matters.

43. The Arbitration Committee members breached the duties alleged in paragraphs 42 and 43 hereof.

44. Rule 198 of the CBOT, in pertinent part, provides as follows:

> "Whenever a panel of the Committee of Arbitration . . . has begun to hear or review evidence and argument in any arbitration proceedings, and the term of a committee member on that panel expires, such member shall continue in office until the arbitration proceeding before his committee has ended if his absence would defeat a quorum of such committee in the proceeding."

45. As alleged in subparagraph 39(a) hereof, the terms of office of Messrs. Conrad, Newman and Rhea on the Arbitration Committee expired on or about January 20, 1976.

46. As alleged in paragraph 37 hereof, Rule 182 of the CBOT provides that five members of the Arbitration Committee shall constitute a quorum.

47. Messrs. Conrad, Newman and Rhea have all participated in meetings of the panel hearing the arbitration matter subsequent to January 20, 1976, the date on which their terms as members of the Arbitration Committee expired. As of and subsequent to January 20, 1976, the presence of all three was

not necessary to constitute a quorum of either the panel or the Arbitration Committee. The continued participation of Messrs. Conrad, Newman and Rhea at hearings after their terms had expired is not authorized under the rules of the CBOT, nor was the continued participation of all three authorized or sanctioned by Rule 198 since all were not required to maintain the quorum of five.

48. During the course of the proceedings, the chairman of the panel, Mr. Newman, stated and continued to state, until on or about April 8, 1976, that all members of the panel were required to be present and participate at each.

49. At a meeting of the panel held on December 11, 1975, during which testimony was taken, Mr. Corbin was not present nor has he attended or participated in any meeting of the panel relating to the arbitration matter subsequent to that date.

50. Tamaris have never waived the attendance of Mr. Corbin at any meeting of the panel relating to this arbitration.

51. Tamaris were never notified that Mr. Corbin had withdrawn from the panel or that he had refused to act on the panel or attend hearings.

52. On or about April 7, 1976, Mr. Klopfenstein was disqualified from the panel and thereafter did not attend any meetings of the panel or participate in any decisions concerning the arbitration matter.

53. There have been other meetings of the panel relating to the arbitration matter at which all members of the panel were not present and whose attendance was not waived by Tamaris.

54. On or about April 7, 1976, and again on or about April 8, 1976, at meetings of the panel, Tamaris notified and advised Messrs. Conrad, Newman, Rhea, Armstrong, Baby and Farr, the only panel members present at such meetings, that the panel was illegally constituted and demanded that the panel disqualify itself from proceeding further, but the panel members disagreed with and rejected the contentions of Tamaris and ordered that the arbitration proceed.

55. On or about May 7, 1976, Tamaris again notified and advised the Arbitration Committee by letter that the panel was not legally constituted and demanded that it disqualify itself. (A copy of the letter is attached hereto as Exhibit N).

56. At a meeting on May 17, 1976, the six panel members named in paragraph 56, above, again disagreed with and rejected the contentions of Tamaris that the panel was illegally constituted and ordered that the arbitration proceeding continue to be heard by the panel.

57. On May 17, 1976, Tamaris refused to proceed further before the panel on the grounds, among others, that the panel was not legally constituted, that the panel was without legal authority or jurisdiction to render a valid award and that any award rendered by it would be void.

58. By reason of the facts hereinabove alleged, the panel was illegally constituted, such panel was without legal authority and jurisdiction to render a valid award and any award made by the panel is void, for the following reasons:

(a) That the controversy, as required by the terms of the arbitration submission agreement, was not submitted for decision to a panel consisting of "a quorum [five members] of the present 'Committee of Arbitration' " (i.e., five persons who were members of the Arbitration Committee on April 27, 1974, the date on which the Petitioners executed the arbitration submission agreement) but, instead, was submitted to a panel consisting of eight persons, only three of whom—Messrs. Conrad, Newman and Rhea—were members of the "present 'Committee of Arbitration' " (i.e., the Committee as constituted on April 27, 1974) and thus eligible to serve on the panel, and five of whom —Messrs. Armstrong, Baby, Corbin, Farr and Klopfenstein—were not members of the Arbitration Committee on April 27, 1974 and thus not eligible to serve on the panel; or

(b) That on January 20, 1976, the terms of office of Messrs. Conrad, Newman and Rhea on the Arbitration Committee having expired and the presence of all of these three persons not being necessary to constitute a quorum of either the panel or the Arbitration Committee, by reason of Rule 198 of the CBOT all of the three persons were not then no longer eligible to continue in office and serve on the panel; or alternatively;

(c) That of the panel members—Messrs. Conrad, Newman, Rhea, Armstrong, Baby, Corbin, Farr and Klopfenstein—who composed the panel, as originally constituted, some were no longer members of the panel, some did not attend each meeting of the panel and some did not participate in all the decisions of the panel.

59. Following Tamaris' refusal to proceed on May 17, 1976, the Committee panel, on June 21, 1976, rendered their award in favor of Bache Delaware. The award ordered Tamaris to pay Bache Delaware the sum of $451,604.16 and costs, and dismissed Tamaris counterclaim against Bache Delaware. (The award is attached hereto as Exhibit Q.)

60. On June 28, 1976, Tamaris appealed the award to the Appeals Committee of the CBOT and as stated in paragraph 5 above the Appeals Committee affirmed the decision of the Arbitration Committee on January 25, 1977. (The decision of the Appeals Committee together with its transmittal letter are attached hereto as Exhibits R and S, respectively.)

61. The decision of the Appeals Committee was rendered without first permitting Tamaris an opportunity to present to the Appeals Committee the issues raised on appeal even though Tamaris requested such an opportunity. (See Exhibits T, U, V, W, X and Y attached hereto.)

62. The decision of the Appeals Committee was rendered without first affording Tamaris a hearing even though a hearing was requested by Tamaris. (See Exhibits T, U, V, W, X & Y).

63. The Appeals Committee was not, nor could it have been, adequately informed of Tamaris' issues on appeal.

64. The absence of issues on appeal rendered the appeal process meaningless and any purported "review" equally meaningless.

65. The refusal and failure to grant a hearing on appeal also rendered the appeal process meaningless and any purported "review" equally meaningless.

66. The failure of the Arbitration Committee to support its award with a statement of reasons, findings of fact and grounds precluded meaningful review by the Appeal Committee.

67. The failure of the Appeal Committee to support its decision with a statement of reasons, findings of fact and grounds operates to prevent this Court from conducting a meaningful review of the reasons, findings and grounds for the Appeals Committee's decision.

68. The failure of the Arbitration Committee to support its decision with a statement of reasons, findings of fact and grounds further operates to prevent a meaningful review of the award and decision.

WHEREFORE, the plaintiffs, Abadallah W. Tamari, Ludwig W. Tamari and Farah W. Tamari, co-partners doing business as Wahbe Tamari and Sons, Co., pray:

(1) That this Court entertain this action;

(2) That this Court enter a judgment pursuant to Title 9, U. S. C. § 10, declaring that the Arbitration Committee and the Appeals Committee of the CBOT were not authorized to enter a valid award or decision against Tamaris for the following reasons: the Arbitration Committee panel was not legally selected as consti-

tuted; the conduct of the CBOT and the Arbitration Committee during the hearings listed in paragraph 31 hereof was contrary to law, arbitrary, prejudicial, biased, unfair and oppressive with respect to the rights of the Tamaris; the Arbitration and Appeals Committees of the CBOT had no jurisdiction to entertain the matter; the award of the Arbitration Committee and the decision of the Appeals Committee each renders meaningful administrative and judicial review impossible; Tamaris were deprived of due process of law under the United States and Illinois constitutions by the refusal of the Appeals Committee to permit the filing of issues on appeal and by failing to provide a hearing in connection therewith;

(3) That the defendant be enjoined from proceeding in this cause, or having this cause adjudicated, in any other forum until such time as the judgment of this Court in this action shall have been entered; and

(4) That the plaintiffs have such other, further and different relief as this court may deem just and proper.

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APPENDIX B.

Exhibit "D"

June 21, 1976

BOARD OF TRADE OF THE CITY OF CHICAGO

In the Matter of the Arbitration Between BACHE & COMPANY, *Complainant,* *versus* ABDALLAH W. TAMARI, FARAH TAMARI, LUDWIG W. TAMARI, individually and as co-partners doing business as WAHBE TAMARI & SONS, and WAHBE TAMARI & SONS, Company, *Respondents.*	Decision

We, the undersigned, being a majority of the arbitrators selected to hear and determine a matter in controversy between the abovementioned claimant and respondents set forth in a submission to arbitration signed by the parties on February 7, 1974 and April 27, 1974, respectively;

And having heard and considered the proofs of the parties, have decided and determined that in full and final settlement of the above matter, respondents shall pay to claimant the sum of $451,640.16 including interest, plus the sum of $25.00 representing one half of the $50.00 arbitration fee paid by claimant to the Chicago Board of Trade;

And further have decided and determined that the counterclaim of respondents be and hereby is dismissed;

And that claimant and respondents shall each pay to the Chicago Board of Trade the sum of $883.77 representing one half of the stenographic and transcript costs of $1767.55.

/s/ STUART A. NEWMAN
Stuart A. Newman, *Chairman*

/s/ ROBERT B. ARMSTRONG
Robert B. Armstrong

/s/ DAVID P. BABY
David P. Baby

/s/ WILLIAM P. CONRAD, JR.
William P. Conrad, Jr.

/s/ DONN R. FARR
Donn R. Farr

/s/ EDWARD B. RHEA, JR.
Edward B. Rhea, Jr.

This is to certify that the foregoing is a true copy of the Award of the Committee of Arbitration in the case entitled Bache & Company versus Abdallah W. Tamari, Farah Tamari, Ludwig W. Tamari, individually and as co-partners doing business as Wahbe Tamari & Sons, and Wahbe Tamari & Sons, Company.

/s/ MARGARET A. OESTERLE
Margaret A. Oesterle
Assistant Secretary

APPENDIX C.

Exhibit "E"

January 25, 1977

BOARD OF TRADE OF THE CITY OF CHICAGO

In the Matter of the Appeal of the Decision of the Arbitration Committee in the Dispute Between
BACHE & COMPANY,
Complainant,
and
ABDALLAH W. TAMARI, FARAH TAMARI, LUDWIG W. TAMARI, individually and as co-partners doing business as WAHBE TAMARI & SONS, and WAHBE TAMARI & SONS, COMPANY,
Respondents.
} Decision

We, the undersigned, being a majority of the Appeals Committee members considering the appeal of Abdallah W. Tamari, Farah Tamari, Ludwig W. Tamari, individually and as co-partners doing business as Wahbe Tamari & Sons and Wahbe Tamari & Sons Company, from the decision of the Arbitration Committee of the Chicago Board of Trade in the controversy between the above-mentioned parties;

And having reviewed the case upon the record of the testimony and evidence given before the Committee of Arbitration, have determined that the decision of the Arbitration Committee shall be upheld in this matter.

/s/ FRANCIS X. O'DONNELL
Francis X. O'Donnell,
Chairman

/s/ HARVEY J. JAUNICH
Harvey J. Jaunich

/s/ THOMAS C. BROWN
Thomas C. Brown

/s/ MYLES J. KERRIGAN
Myles J. Kerrigan

/s/ JOHN F. GILMORE, JR.
John F. Gilmore, Jr.

/s/ EMMETT A. MCKERR
Emmett A. McKerr

APPENDIX D.

Exhibit "B"

BOARD OF TRADE OF THE CITY OF CHICAGO

In the Matter of the Arbitration Between

BACHE & COMPANY,
Complainant,
vs.

WAHBE TAMARI, ABDALLAH W. TAMARI, FARAH TAMARI, individually and as co-partners doing business as WAHBE TAMARI & SONS, and WAHBE TAMARI & SONS, CO.,
Respondents.

Respondents herein, Abdallah W. Tamari, Farah W. Tamari and Ludwig W. Tamari, individually, and as co-partners doing business as Wahbe Tamari & Sons Co., by their attorney, Robert P. Howington, Jr., answer the "Complaint" filed in this arbitration proceeding, as follows:

ANSWER

1. Respondents, in answer to the allegations of paragraph 1 of the "complaint", admit such allegations except the allegation that Bache & Co. Incorporated operates and maintains an office in Beirut, Lebanon, which allegation the respondents deny. Respondents, in response to such allegation, state that Bache & Co. (Lebanon) S. A. L., an agent of Bache & Co. Incorporated, operates and maintains an office in Beirut, Lebanon, and that such agent is a legal entity to be differentiated from Bache & Co. Incorporated, the "complainant" in these proceedings.

2. Assuming that the term "Bache & Co." as used in paragraph 2 of the "complaint" means "Bache & Co. Incorporated," the respondents admit the allegations of paragraph 2 of the "complaint".

3. Respondents deny the allegations of paragraph 3 of the "complaint" and, in answer thereto, state that the respondents are Abdallah W. Tamari, Farah W. Tamari and Ludwig W. Tamari, that they, as co-partners, are doing business as Wahbe Tamari & Sons Co., that they are residents of Beirut, Lebanon and that their post office addresses are Box 1533, Beirut, Lebanon. Respondents, in further answer, state that they never intended to do business under the style of "Wahbe Tamari & Sons" but inadvertently did so and that Bache & Co. (Lebanon) S. A. L. had knowledge of such facts. Respondents request, further, that the caption of this proceeding be amended to show such true and correct information as stated herein.

4. In answer to paragraph 4 of the "complaint," the respondents Abdallah W. Tamari, Farah W. Tamari and Ludwig W. Tamari admit that they, doing business as Wahbe Tamari & Sons Co., were customers of Bache & Co. Incorporated. They further admit that a dispute has arisen relating to two accounts in which they had an interest. Respondents deny the remaining allegations of paragraph 4 of the "complaint."

5. Respondents assume that the allegations of paragraph 5 of the "complaint" are true, but further state that it was the respondents who first requested that the dispute be arbitrated before the Committee of Arbitration of the Board of Trade of the City of Chicago. (Compare Exhibit E and Exhibit D attached to the "complaint" of Bache & Co. Incorporated.)

6. Assuming that the copies attached to the "complaint" are true copies of the customers' agreements between Bache & Co. Incorporated and respondents, the respondents admit the allegations of paragraph 6 of the "complaint."

7. Assuming that the term "Bache & Co." as used in paragraph 7 of the "complaint" means "Bache & Co. Incorporated",

the respondents admit the allegations of paragraph 7 of the "complaint" and, in further answer thereto, state that they submitted the dispute to arbitration before the Committee of Arbitration of the Board of Trade of the City of Chicago on the condition that the entire claims of both Bache & Co. Incorporated and the respondents would be arbitrated before such Committee.

8. Respondents deny the allegations of paragraph 8 of the "complaint" and, in answer thereto, state that the respondents had interests in two commodity accounts with Bache and Co. Incorporated, a Delaware corporation, the principal offices of which are located in New York City, New York, such accounts being numbered MF 1564 and MF 1602. In further answer, the respondents state that they had the entire interest in Account # MF 1564 but only one-half interest in Account # MF 1602, the other half interest being owned by George Khnouf, which facts were known to Bache & Co. (Lebanon) S. A. L.

9. Respondents deny the allegations of paragraph 9 of the "complaint" and, in answer thereto, state that, although a considerable amount of the commodity trading was done on the Board of Trade of the City of Chicago, trading also occurred on other commodity exchanges including, among others, the Chicago Mercantile Exchange and the London Sugar Exchange. The commodities traded were as follows: sugar, cattle, hogs, pork bellies, soybeans, corn, wheat, cotton, soybean meal, silver, orange juice, coffee, soybean oil and platinum. Respondents admit that Bache & Co. Incorporated has requested the respondents to pay the amounts set forth in paragraph 9 of the "complaint." Respondents, however, have refused to pay such amounts for the reasons set forth in their "Answer" and in their "Defense and Counterclaim."

10. Respondents admit the allegations of paragraph 10 of the "complaint", and further state that they have previously paid to Bache & Co. Incorporated sums totalling $2,150,000.00 for losses suffered in such accounts.

11. Respondents deny the allegations of paragraph 11 of the "complaint" and state that there is due and owing to the respondents from Bache & Co. Incorporated the sum of $2,150,000.00 for the reasons set forth in respondents' "Defense and Counterclaim."

Defense and Counterclaim of Respondents

As a complete defense to the allegations of the "complaint" and as a "counterclaim", respondents state as follows:

12. Bache & Co. Incorporated, acting with and through its agent, Bache & Co. (Lebanon) S. A. L., caused and permitted to be made an excessive number of trades for the two accounts in which the respondents had an interest to the extent that the commissions generated for Bache & Co. Incorporated and Bache (Lebanon) S. A. L. by such trading were excessive, and Bache & Co. Incorporated and Bache & Co. (Lebanon) S. A. L. churned such accounts, all to the detriment and damage of the respondents and in violation of Section 4b of the Commodity Exchange Act and Rule 146 of this Association, as follows:

(a) Solicited the respondents on many occasions for the purpose of having the respondents open a commodities account with Bache & Co. Incorporated, representing to the respondents that Bache & Co. Incorporated and Bache & Co. (Lebanon) S. A. L. were expert in the handling of commodity futures trading and also were expert in analyzing commodity markets and forecasting the trends in such markets;

(b) Approached and solicited associates of the respondents and requested such associates to recommend to the respondents that they open a commodities account with Bache & Co. Incorporated;

(c) By such solicitations and representations, caused the respondents to repose complete trust and confidence in Bache & Co. Incorporated and its agent, Bache &

Co. (Lebanon) S. A. L., and caused the respondents to open one account (MF 1564) with Bache & Co. Incorporated in which account they had the entire interest and, subsequently, to open a second account (MF 1602) with Bache & Co. Incorporated in which account they had a half interest, George Khnouf owning the other half interest, which facts were known to Bache & Co. (Lebanon) S. A. L.;

(d) By such solicitations and representations, caused the respondents to repose complete confidence and trust in Bache & Co. Incorporated and Bache & Co. (Lebanon) S. A. L. as to their expertise in handling commodity accounts and as to their expertise as commodity analysts;

(e) Recommended to the respondents purported advantages of vesting trading authority over the commodity accounts in individuals other than the respondents, and relying upon such advice, the respondents vested control over such accounts in individuals other than the respondents, which was arranged by Bache & Co. (Lebanon) S. A. L., and which individuals were inexperienced in commodity futures trading and which facts were known to Bache & Co. (Lebanon) S. A. L.;

(f) Requested that the respondents execute a "hedging letter", thereby permitting trading on lower margins, despite the fact that the agents and employees of Bache & Co. (Lebanon) S. A. L. knew that such trading was not for hedging purposes;

(g) Assigned three commodity account executives to the two commodity accounts and thus facilitated the volume of trading in such accounts;

(h) Telephoned or visited the respondents, or their employees and agents, many times a day advising and recommending that the accounts trade in certain and various commodity futures contracts and caused such

accounts to be so traded, all with the knowledge that the respondents and their employees and agents, while knowledgeable in coffee and sugar, were inexperienced in the business of trading in commodity futures, particularly with reference to trading on American exchanges;

(i) Caused or permitted such accounts to be traded when such accounts were in a severely undermargined or deficit position;

(j) Caused or permitted trading in numbers of contracts in excess of written restrictions imposed by the respondents;

(k) Failed to supervise properly the commodity account executives handling such accounts;

(l) Caused and permitted such accounts to trade in approximately 2800 contracts during a period of approximately 13 months, which trading generated commissions of approximately $118,000.00;

and as a consequence of such acts and omissions violated similar rules of other exchanges where transactions were executed for such accounts.

13. Bache & Co. Incorporated, in its capacity as a futures commission merchant, to the detriment and damage of the respondents and in violation of the Commodity Exchange Act:

(a) Failed to furnish in writing directly to the respondents as of the close of the last business day of each calendar month, or as of any other regular monthly date selected, a statement which clearly showed the open contracts with prices at which they were acquired and the ledger balance carried for each of the accounts in which the respondents had an interest, all as required by Section 1.33 of the regulations promulgated under the Commodity Exchange Act;

(b) With respect to each account, failed to furnish in writing directly to the respondents a monthly statement, or an accompanying supplemental statement, showing the net profit or loss on all contracts closed since the date of the previous statement and the net unrealized profit or loss in all open contracts figured to the market, all as required by paragraph (a)(2) of Section 1.33a of the regulations promulgated under the Commodity Exchange Act;

(c) With respect to each account, failed to furnish directly to each co-partner respondent a copy of the monthly statement required by Section 1.33 above, clearly showing on such statement, or on an accompanying supplemental statement, the further information specified in paragraph (a)(2) of Section 1.33a, all as required by paragraph (b) of Section 1.33a of the regulations promulgated under the Commodity Exchange Act; and

(d) By reason of the omissions alleged in subparagraphs (a), (b) and (c) hereof, concealed from the respondents and deceived them as to the true status and condition of such accounts and facilitated the churning of such accounts, all in violation of Section 4b of the Commodity Exchange Act.

14. Bache & Co. Incorporated, by accepting and carrying the accounts in which the respondents had an interest and over which individuals other than the respondents exercised trading authority or control, violated Regulation 1990 of this Association and engaged in conduct inconsistent with just and equitable principles of trade under Rules 145 and 146 of this Association, all to the detriment and damage of respondents, as follows:

(a) By failing to obtain a copy of the letter referred to in subparagraph b of paragraph 2 of Regulation 1990;

(b) By failing to send directly to the respondents a monthly statement showing the exact position of each account, including all open trades figured to the market, as required by subparagraph e of paragraph 2 of Regulation 1990;

(c) By accepting, carrying or initiating trades in such accounts, when the net equity in such accounts in Board of Trade commodities was less than $5,000.00, thus violating paragraph 5 of Regulation 1990;

and engaged in similar practices with respect to such accounts concerning commodity transactions executed on other exchanges, thus violating the rules and regulations of those exchanges.

15. Bache & Co. Incorporated, to the detriment and damage of the respondents, violated certain other rules and regulations of this Association, as follows:

(a) Violated Rule 210 of this Association by carrying the accounts in which the respondents had an interest without proper and adequate margin;

(b) Violated paragraph 8 of Regulation 1822 by requesting through its agent, Bache & Co. (Lebanon) S.A.L., that the respondents execute a "hedging letter", and then carrying the accounts in which the respondents had an interest on hedging margins, when Bache & Co. (Lebanon) S.A.L. knew that the trading in such accounts was not for hedging purposes;

(c) Violated paragraph 12 of Regulation 1822, when acting through or with its agent, Bache & Co. (Lebanon) S.A.L., encouraged, advised, and recommended to and caused the respondents, or their agents, to make new trades, and then accepted the orders for such new trades, at a time when the accounts in which the respondents had an interest were not properly margined;

(d) Violated paragraph 14 of Regulation 1822, by failing to close the accounts in which the respondents had an interest when such accounts were in a continuing deficit or undermargined position;

(e) Violated paragraph 15 of Regulation 1822 by permitting or causing the accounts in which the respondents had an interest to trade when the net position resulting from such trading was not properly margined as required by Rule 210 and Regulations 1822 and 1822-A;

and engaged in similar practices with respect to such accounts concerning commodity transactions executed on other exchanges, thus violating the rules and regulations of those exchanges.

16. During the time respondents were trading through Bache & Co. Incorporated, they reposed complete trust and confidence in Bache & Co. Incorporated and its agent, Bache & Co. (Lebanon) S.A.L. and relied on the representations and assurances of Bache & Co. Incorporated and its agent. Because of such broker-customer relationship, Bache & Co. Incorporated and its agent owed a fiduciary duty to the respondents. Despite such fiduciary relationship, Bache & Co. Incorporated, acting with or through its agent, Bache & Co. (Lebanon) S.A.L., breached such fiduciary duty to the respondents, engaged in conduct inconsistent with just and equitable principles of trade and violated Section 4b of the Commodity Exchange Act, in the following particulars, knowing at all times of the inexperience of the respondents in the trading of commodity futures contracts:

(a) Arranged for individuals other than the respondents to control the accounts in which the respondents had an interest, with the knowledge that such individuals were not experienced in the trading of commodity futures contracts;

(b) Failed to keep the respondents properly advised as to the true status of such accounts;

(c) Failed to apprise the respondents of the attendant risks which were inherent in trading such accounts;

(d) Encouraged, advised, recommended to and caused the respondents to take short positions, and continue such positions, in a "bull market";

(e) Encouraged, advised, recommended to and caused the respondents to add to and "double up" their short positions as losses mounted resulting from such short positions;

(f) Failed to advise the respondents of the existence of "daily trading limits" on the various exchanges and explain the potential risks created by such "daily trading limits" when a market "locked up";

(g) Made false statements and gave false assurances to the respondents respecting the condition of the commodity markets;

(h) Failed to liquidate positions when instructed to do so by the respondents;

(i) Encouraged, advised, recommended to and caused respondents not to liquidate positions which respondents had requested be liquidated;

(j) Continued to carry the accounts in which the respondents had an interest when respondents had requested that such accounts be closed and when such accounts were in a severely undermargined or deficit position;

(k) Continued to carry such accounts during a period of civil disturbances in Lebanon, when the accounts were in a severe deficit positions, when a curfew existed and communication was difficult, and after the respondents had requested that such accounts be closed;

(l) Was negligent in executing orders for such accounts;

(m) On limit-up days, filled orders of customers received subsequent to the orders of respondents and did not fill the orders of the respondents;

(n) Represented to the respondents that on "limit days" orders of the respondents could be "married" with orders of Bache customers from other Bache offices without going through the trading pits, and further represented to the respondents that orders could be so filled by "special handling" of the respondents' orders;

(o) Failed to explain to respondents the use of "open orders" or "good till cancelled orders" and failed to employ such kinds of orders despite respondents' instructions to liquidate positions;

(p) Encouraged, advised and permitted trading in excess of restrictions imposed by the respondents as to the number of contracts which could be traded;

(q) Failed to explain the nature and characteristics of the commodities which were traded in such accounts (e.g., the respondents were of the opinion that pork bellies were hides);

(r) Misrepresented the expertise of the commodity account executives and agents as to their capabilities in handling commodity accounts;

(s) Misrepresented the expertise of account executives and agents, who were handling the accounts, as to their capabilities as market analysts;

(t) Failed to supervise properly the account executives and agents handling such accounts;

(u) With respect to account # MF 1602, failed to indicate in its records that George Khnouf had a half interest in such account, which Bache & Co. (Lebanon) S.A.L. had knoweldge of, and, further, failed to request of George Khnouf any payment with respect to the losses suffered in such account or the debit balance in such account, when it was through George Khnouf that Bache & Co. (Lebanon) S.A.L.

had approached the respondents and solicited such account, said individual being the same person whom Bache & Co. (Lebanon) S.A.L. had arranged to have control over such account.

17. By virtue of the common law and Section 2(a) of the Commodity Exchange Act, Bache & Co., Incorporated is responsible for the acts of its employees and agents, including Bache & Co. (Lebanon) S.A.L.

18. By reason of the facts hereinabove alleged, Bache & Co. Incorporated, acting with and through its agent, Bache & Co. (Lebanon) S.A.L., excessively traded the commodity accounts in which the respondents had an interest and churned such accounts, made, or caused to be made, false reports and statements to the respondents, concealed from the respondents and deceived them as to the true status and condition of such accounts, all in violation of Section 4b of the Commodity Exchange Act and in violation of the regulations promulgated under such Act; engaged in conduct inconsistent with just and equitable principles of trade by violating the applicable rules and regulations of the respective exchanges on which the trades for such accounts were executed, all to the serious detriment and damage of respondents and in violation of the Commodity Exchange Act; and further breached the fiduciary duty owing to the respondents, thereby damaging respondents to the extent of the sum of $2,150,000.00, which sum respondents, without knowledge of all the material facts hereinabove alleged, paid to Bache & Co. Incorporated, and further damaging respondents to the extent of the sum of $376,366.96, which sum Bache & Co. Incorporated now claims to be owing by the respondents to it, both of which sums were caused to be lost by reason of the acts and omissions of Bache & Co. Incorporated and its agent, Bache & Co. (Lebanon) S.A.L. as hereinabove alleged.

WHEREFORE, the respondents pray:

(a) That the respondents recover from Bache & Co. Incorporated the sum of $2,150,000.00; and

(b) That it be adjudged that Bache & Co. Incorporated is not entitled to recover from the respondents the sum of $376,366.96 or any part thereof.

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